MOTION TO ADVANCE.

NOTICE, MOTION, STATEMENT and REASONS FOR APPLICATION

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1910.

No. [redacted] 195.

CHARLES T. PRESTON,
Plaintiff in Error,

vs.

THE CITY OF CHICAGO et al.

In Error to the Supreme Court of the State of Illinois.

Filed September [redacted], 1910.

A. B. CHILCOAT,
Attorney for Plaintiff in Error.

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preme Court of the United States

October Term, A. D. 1910.

No. 840.

Charles T. Preston,
Plaintiff in Error,
vs.
he City of Chicago *et al.*,
Defendants in Error.
} *Writ of Error.*

NOTICE.

o William H. Sexton, Corporation Counsel of said City and Counsel for Defendants in Error:

Please take notice that on Monday, May 29, 1911, the opening of said court, or as soon thereafter as unsel can be heard, the motion, a copy of which is ereto attached, will be submitted to said court for s decision thereon. Annexed hereto is a copy of e "statement of the matter involved" and the reasons for said application," which will be sub-itted with said motion in support thereof.

Charles T. Preston
A. B. Chilcoat

Counsel for Plaintiff in Error.

Received a copy of above Notice this 8th
y of May, 1911.

Wm H Sexton

Corporation Counsel, City of Chicago.

SUPREME COURT OF THE UNITED STATES.

October Term, 1910.

No. 840.

Charles T. Preston,
Plaintiff in Error,
vs.
City of Chicago *et al.*,
Defendants in Error.

MOTION TO ADVANCE.

Now comes the plaintiff in error, in the above entitled cause, by his attorney, and moves the court to advance said cause to an early hearing, for the purpose of having the same reviewed by this court, under Rule 32, applicable to "Writs of Error and Appeals, under the Act of February 25, 1889, Chapter 236." Charles T. Preston

A. B. Philpott
Counsel for Plaintiff in Error

Statement of the Case.

A petition for a writ of *mandamus* was filed in the Superior Court of Cook County, Illinois, March 11, 1903, by said plaintiff in error against the defendants in error, for the purpose of having petitioner's name restored to the pay-roll of police patrolmen in the City of Chicago, from which it was illegally, and without *due process of law*, dropped by order of the superintendent of police of said city, March 14, 1898.

By the amended and supplemental petition it is averred, in substance, that on, to-wit, the 13th day of February, 1863, the People of the State of Illinois, represented in the General Assembly, duly passed an Act to reduce the Charter of the City of Chicago, and the several acts amendatory thereof into one act, and revise the same. That by different sections of Chapter X, of said act, provisions were made as follows:

By Section 1 of said act there was established an executive department of the municipal government of said city to be known as the board of police. Said board to consist of three commissioners, in addition to the mayor, as an *ex officio* member thereof. By Section 4 it was provided that said board should assume and exercise the entire control of the police force of said city, and possess full power and authority over the police organization, government, appointments and discipline, within said city. By Section 6 it was provided that the duties of the police

force should be executed under the direction and control of said board. That the police force should consist of a superintendent of police, three captains of police, six sergeants, ninety police patrolmen, and as many more police patrolmen as should be authorized by the common council on application of said board. That the several offices thereby created should be severally filled by appointment in the mode prescribed by the act. That each person so appointed should hold office during such time as he should observe and execute all the rules and regulations of said board, the laws of the state and the ordinances of the city. By Section 7 it was provided that "*no person shall be removed therefrom except upon written charges preferred against him to the board of police, and after an opportunity shall have been afforded him of being heard in his defense.*"

That on the 16th day of February, 1865, said act was again amended by the People of the State of Illinois, represented in the General Assembly, by which amendment Sections 6 and 7 of said Act of 1863 were superseded by Sections 15, 16 and 19 of said Act of 1865. That by said Section 15 it was provided that the duties of the police force should be executed under the control of said board. *That the said force should consist of a general superintendent of police, three captains of police, sergeants of police not exceeding twelve, and as many more police patrolmen, not exceeding two hundred, as may be authorized by the common council, on the application of the board of police commissioners; each patrolman so appointed should hold office during such time as he observe and execute all the rules and regulations*

of said board, the laws of the state and the ordinances of the city.

By said Section 16 it was provided, "*that no person shall be removed therefrom, except upon written charges preferred against him to the board of police, and after an opportunity shall have been afforded him of being heard in his defense.*" By said Section 19 it was provided that "the *mayor of said city should cease* to be in any manner a member of said board of police."

Said petition avers that said police force continued under the control of said board of police until the Legislature of the State of Illinois passed an act entitled "An Act to Provide for the Incorporation of Cities and Villages," approved April 10, 1872, and until the same was adopted by the legal voters of the City of Chicago, on April 23, 1875. That by Section 6 of said last mentioned act, it was provided that "all courts in this state shall take judicial notice of all villages and cities organized under this act, and of the changes of the organization under this act, and from the time of such organization or change of organization the provisions of this act shall be applicable to such cities and villages, and all laws in conflict therewith shall no longer be applicable. *But all laws or parts of laws, not inconsistent with the provisions of this act, shall continue in force and applicable to any such village, the same as if such change had not taken place.*" That by Section 1 of Article V of said act it was provided that "the city council in cities and the president and board of trustees in villages shall have the following powers:

"*Sixty-six. To regulate the police of the city or village, and pass and enforce all necessary police ordinances.* * * *

"Sixty-eight. To prescribe the duties and powers of a superintendent of police, policemen and watchmen."

That after the adoption of said General Act, by the legal voters of said city, and on, to-wit, the 28th of June, 1875, the city council of said city passed an ordinance, thereafter approved by the mayor, for the reorganization of the police department of said city. That Section 1 of said ordinance purported to establish and create a department of the municipal government of said city, to be known as the department of police. That Section 2 assumed to create the office of city marshal of said city, said city marshal to be appointed by the mayor, by and with the advice and consent of the city council, and to be the head of said police department. *That as such head he should assume and exercise the entire control of the police force of said city, as to the police organization, government, appointments and discipline* within said city. That by Section 5 "*the said force should consist of one general superintendent of police, one deputy superintendent of police, four captains of police, twenty sergeants, and the police now in the employ of the city, which may be increased or diminished in number from time to time.*" That by Section 17 it was provided that the police force, as heretofore existing, shall continue to be the police force until otherwise changed by this ordinance.

That afterwards, on, to-wit, the 13th day of April, 1881, the city council of the City of Chicago, passed

an ordinance, which was approved on the 18th day of April, 1881. That by said last mentioned ordinance a department of police was established in said city; that the office of superintendent of police of said city was created; and it provided that said superintendent should have the management and control of all matters pertaining to said department; that he should appoint all officers and members of said department; that said superintendent should have the power to remove from the police force of said city any police patrolman at his pleasure.

The petition insists that the provision of said ordinance purporting to give the superintendent of police power to remove from the police force of said city any police patrolman at his pleasure was directly at variance with the statute of the State of Illinois pertaining to the removal of police patrolmen from said police force in said city and therefore such provision was and is absolutely void. That the provisions of said ordinance, so far as valid, were continued in force in said city until the passage, by the Legislature of the State of Illinois, of a Civil Service Act for said city, and the adoption thereof by said city, as is hereinafter stated.

Said petition avers that petitioner was duly appointed to the office of police patrolman in said city, June 1, 1886, took the oath of office, entered upon the performance of duties as such officer, and thereafter continued in the discharge of said duties until, to-wit, March 14, 1898, when the further performance of his said duties was wrongfully and unlawfully interrupted, as hereinafter shown.

The petition avers that the *office* of police patrol-

man in said City of Chicago was created by said act of the Legislature of the State of Illinois, passed February 13, 1863, and continued by said amendment thereto, passed February 16, 1865. That under said acts a police patrolman in said city could only be removed from office after written charges preferred against them and notice thereof, and after being afforded an opportunity of being heard in his defense. That "An Act to Regulate the Civil Service of Cities" was duly passed by the Legislature of the State of Illinois, approved and in force March 20, 1895, and was duly adopted by the legal voters of the City of Chicago April 2, 1895. That afterwards, on July 1, 1895, George B. Swift, then mayor of said city, proclaimed the said Civil Service Act to be in full force and effect in the City of Chicago, and appointed three Civil Service Commissioners, who proceeded to classify the offices and places of employment in said city, pursuant to said act, making two classes thereof, the first being Class A, constituting the official service, and Class B the labor service. Division D of the official service represented the police service and included "all persons in the uniformed police force." That at the time of the adoption of said classification, all policemen in the City of Chicago, including petitioner, plaintiff in error herein, were in the uniformed police force of said city, and that by virtue of said classification they became and were classified in said Division D of the said official service of said city, under said Civil Service Act. That thereupon the offices and places of employment so classified by said commission did constitute the classified service of said City of Chi-

cago. That all police patrolmen of said city, at the time of said classification of the offices then and there held by them, respectively, then and there became police patrolmen *de jure*, in the said classified service of said city. That by Sections 31 and 32 of said Civil Service Act it is provided that "no auditing officer of said city adopting said act shall approve the payment of any salary or wages for services as an officer or employe of said city unless such person is occupying an office or place of employment according to the provisions of law, and entitled to payment therefor."

That the said board of Civil Service commissioners of said city, in compliance with said Sections 31 and 32, passed upon and certified the pay-rolls of employes and officers, including police patrolmen of said city; that by said certification it was, in legal effect, declared by said Civil Service commissioners, that all police patrolmen named on said pay-roll so certified were "entitled to be paid as persons occupying an office or place of employment" under and according to the provisions of said Civil Service Act, as being in the classified service of said city, under said act. That at the time of said classification, petitioner, plaintiff in error herein, was a police patrolman in the "uniformed police force of said city, and was thereby continued a police patrolman, as an officer *de jure*, in the police department of said city, and has so continued to be such officer from thence hitherto."

That for more than two years next prior to the 14th day of March, 1898, petitioner was a police patrolman of said city, and continuously performed the

duties of such policeman, and from month to month was certified by said Civil Service commissioners as a police patrolman of said city, entitled to pay as such under said Civil Service Act. That Joseph Kipley, superintendent of police of said City of Chicago, on, to-wit, the 14th day of March, 1898, illegally and without warrant of law, directed the name of petitioner, plaintiff in error herein, to be dropped from the pay-roll of police patrolmen of said city, and thereupon his name was dropped from said pay-roll. *That such action was taken without any charges having been preferred against him, and without any trial of any charges of any nature against him and without the written concurrence of the then mayor of said city; that said conduct of said Joseph Kipley, in so omitting and excluding his name from said pay-roll, was and is a wrongful denying to him of his legal rights, as a police patrolman of said city, to the emoluments of his said office, and was without due process of law. That in consequence of said action by said Joseph Kipley, he has not been paid any portion of the salary accruing and due to him as a police patrolman as aforesaid from, to-wit, said 14th day of March, 1898, until the present time. That he made demand upon the said city, Carter H. Harrison, mayor of said city, and upon said Joseph Kipley, during their incumbency of their respective offices, that his name be restored to the pay-roll of police patrolmen of said city, to which said demand they respectively refused to comply. That under the provisions of the laws of the state and ordinances of the City of Chicago, the salary to which he was lawfully entitled from said 14th day of March, 1898, until the*

present time, was $83.33 per month, less one per cent thereof, which under the provisions of the Police Pension Act, as a part of the statute law of the State of Illinois, during the period aforesaid, should be deducted by the Police Pension Board, or other proper authority of said City of Chicago, from his said salary, and paid into the Police Pension Fund of said city; that from the time of his appointment as such police patrolman of said city, on the 1st day of June, 1886, up to and including the 14th day of March, 1898, there was, from time to time, deducted from his salary, and paid into said Police Pension Fund, under the then existing Police Pension Laws of the State of Illinois, the sum of one per cent, from each and every monthly payment of his salary accruing to him. That "under the provisions of said Pension Law, to which for greater certainty and a fuller statement of the legal rights thereby secured to him to share in said fund to which he had theretofore been required to, and theretofore did, contribute as aforesaid, petitioner prays to refer with the same effect as if said act, being then and still one of the public laws of the State of Illinois, were herein fully set forth and quoted."

That the act of the said Joseph Kipley, in causing the name of petitioner, plaintiff in error herein, to be omitted and excluded from the pay-roll of police patrolmen in the department of police in said City of Chicago, resulted in the denying to him his legal right to share in the benefits of said Pension Fund, and was and is wholly unauthorized and without due process of law; and he further shows that such action of said Joseph Kipley was and is contrary to Section

2 of Article 2 of the Constitution of the State of Illinois, which reads as follows, to-wit: "No person shall be deprived of life, liberty or property, without due process of law." That such action *was and is, also, contrary to Section 1 of Article XIV of the Amendments to the Constitution of the United States of America, which reads as follows, to-wit: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."*

That the action of said Joseph Kipley, and of the said other defendants, in continuing to omit and exclude petitioner's name from the pay-roll of the police patrolmen of said city had and has the effect to deprive him of his right to exercise the functions and duties of a police patrolman as a member of the Classified Civil Service of said City of Chicago, and to receive and enjoy the salary pertaining to the office of police patrolman of said city so held by him, which was and is a wrongful denying to him of his legal rights and without due process of law, and of the equal protection of the law. That the City of Chicago, the mayor of said city and the superintendent of police of said city are respectively estopped by law and by the facts hereinbefore stated and set forth, *to now deny that he was, on the said 14th day*

of March, 1898, and from thence hitherto has been, and still is, a police patrolman in the Classified Civil Service of said city, under said Civil Service Act, and that he was, and is as such police patrolman, entitled to all the benefits *and protection afforded by said Civil Service Act, and particularly to the benefits and protection of the provisions of said act governing the removal or discharge from said service of police patrolmen of said city, in the classified service thereof.* That before the filing of said petition herein, the said Joseph Kipley was succeeded in the said office of superintendent of police of said City of Chicago, by Francis O'Neill, duly appointed by Carter H. Harrison, the then mayor of said city. That said Francis O'Neill was succeeded by John M. Collins, who was appointed to the office of superintendent of police of said city by Edward F. Dunne, who was succeeded in office as mayor of said city by Fred A. Busse. That said John M. Collins, said superintendent of police of said city, was succeeded in said office by George M. Shippy, appointed to said office by said Fred A. Busse, the then mayor of said city. That since the filing of the said petition herein, the personnel of said Civil Service Commissioners of said City of Chicago has been changed and said Civil Service Commissioners now consist of Elton Lower, M. L. McKinley and H. D. Fargo. That appropriations were made by the city council of said city for the year 1886, and for each and every year thereafter, up to and including the year 1898, for the payment of police officers and employes of said city. That during all of said time, from the said 1st day of June, 1886, up to and including said 14th day of

March, 1898, petitioner was a police patrolman in the said uniformed police force of said city, and drew his salary as a police patrolman of said city. That from the 1st day of July, 1895, up to the said 14th day of March, 1898, petitioner drew his pay, as such uniformed police patrolman, from month to month, his monthly voucher for each and every month thereof being duly certified by said Civil Service Commissioners of said city, as his pay therefor became due him. That in like manner, in the year 1899, and each and every year thereafter, up to and including the present time, there were annual appropriations made by said city council of said city, for the payment of police patrolmen in the uniformed police force of said city, in the *Classified Civil Service thereof*, for each and every ensuing year, respectively; that he is entitled under said appropriations to be carried upon said pay-roll for each and every month of said several years, up to and including the present time, as having been lawfully in the service of said city, in the classified service thereof, as a police patrolman in said city.

The petitioner avers that from the time said Joseph Kipley, claiming to act in that behalf as superintendent of police of said city, caused the name of petitioner to be omitted and excluded from the pay-roll of the police department of the said city; and each and every one who has been duly and legally appointed to the office of superintendent of police of said city, from the month of January, 1900, up to and including the present time, has still caused, and so causes, the name of your petitioner to be excluded and omitted from said pay-roll.

That in consequence of the wrongful action of the said Joseph Kipley, and those who have followed him in office as superintendent of police of said city, up to and including the present time, in causing the omission of your petitioner's name from the pay-rolls of police patrolmen of said city, your petitioner has not been paid any portion of the salary accruing and due to him as a police patrolman as aforesaid from, to-wit, said 14th day of March, 1908, until the present time. And your petitioner has made demand upon the said City of Chicago, and upon said Carter H. Harrison, mayor of said City of Chicago, and upon Joseph Kipley, as superintendent of police of said City of Chicago, which demand was made during their said incumbency of their respective offices, that his name should be placed on, or restored to, the pay-roll of police patrolman of said City of Chicago, to the end that your petitioner might be enabled to draw the salary due him as a police patrolman, alike the salary already accrued to him, and the salary accruing to him from month to month as such police patrolman of said City of Chicago, to which he is justly and lawfully entitled; but the said City of Chicago, the said Carter H. Harrison, as mayor thereof, and the said Joseph Kipley, as superintendent of police thereof, and those who have followed him in said office as superintendent of police of the said City of Chicago, whom your petitioner makes defendants herein, have respectively refused to comply with your petitioner's reasonable and lawful demand in the premises, and still do refuse so to do.

The petitioner prays a writ of mandamus under

the seal of the court directed to the City of Chicago and certain officers of said city, commanding them respectively as follows: Commanding said City of Chicago and said respective officers, other than the Civil Service Commissioners, to forthwith place the name of your petitioner upon the roster of police patrolmen of said City of Chicago, to the end that petitioner may hereafter draw the pay due petitioner as police patrolman of said City of Chicago, from time to time as other police patrolmen are paid; and

Commanding said Civil Service Commissioners of said City of Chicago to certify the name of petitioner as a person entitled to pay as a police patrolman of said City of Chicago whenever petitioner's name shall hereafter appear as such police patrolman upon any pay-roll of police patrolmen presented to the Civil Service Commissioners for certification—to the end that petitioner may hereafter draw the salary due him as a police patrolman of said City of Chicago, as other police patrolmen are paid.

The petitioner also asks that such further order may be made in the premises as justice may require.

The respondents to said petitioner, said City of Chicago *et al.*, filed a demurrer thereto, which demurrer was sustained and said amended and supplemental petition was by order of said court dismissed.

A writ of error was sued out of the Supreme Court of Illinois, and the record of said Superior Court was brought before said Supreme Court for a review of the action of Superior Court. Said Supreme Court of Illinois sustained the action of said Superior Court in the premises; and petitioner by writ of error duly issued has brought said proceedings to this court.

for its action in the premises, to the end that petitioner may obtain his legal rights, under the Constitution of the United States, of which he is now deprived by said action of said Supreme Court of Illinois.

REASONS FOR THE APPLICATION.

1. That petitioner, plaintiff in error herein, was deprived of his right to perform the functions or duties of his office as a police patrolman in the department of police in the City of Chicago without due process of law, in violation of Section 2 of Article 2 of the Constitution of the State of Illinois, and of Section 1 of Article XIV of the Amendments to the Constitution of the United States; which action was, in legal effect, a deprivation of petitioner's right to perform the functions or duties of his said office without having written notice of charges preferred against him, and an opportunity afforded him of being heard in his defense.

2. That said action was, in legal effect, a deprivation of petitioner's property rights to the emoluments incident to his said office, in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States.

3. That there are twenty cases in the Superior Court of Cook County, Illinois, and twenty-seven cases in the Circuit Court of Cook County, Illinois, awaiting the opinion of this court in the case at bar.

That at the time the case at bar was filed in the Superior Court of Cook County, Illinois, there were twenty more cases filed, in said court, by police pa-

trolmen of said City of Chicago, and twenty-seven more cases filed, in the Circuit Court of said Cook County, by police patrolmen of said city; the same form of petition was filed in each of said cases, and for the same cause; and in each and every of said cases the same form of amended and supplemental petition was filed, by an order of court first had and obtained: and the general demurrer thereto, in each of said cases, was sustained, and the petition in each of said cases was dismissed by the court, with judgment entered therein, against petitioner for costs. That the time to prosecute a writ of error in each of said cases will expire before the case at bar will be considered by this court, except the case at bar be advanced to an early hearing; so that if this court were to find in favor of the plaintiff in error herein, the petitioner in each one of the other cases mentioned herein might have an opportunity to obtain his legal rights by reason of the favorable ruling upon the case at bar.

That a number of the other persons—who were, and for years past have been, excluded from the exercise of the powers and performance of the duties of policemen, under the same and identical conditions as those advanced by the petitioner herein, as entitling him to the relief sought herein by reason of the wrongful exclusion of such persons, respectively, from the exercise of the office and performance of the duties of police officers of said city and members of said city's police force, and in consequence of the wrongful conduct of said city in the premises, have been deprived of the pay attached to such office and services under the provisions of the ordinances

of said city from time to time adopted by the city council of said city and in force—are men of family, in moderate circumstances, and compelled to seek and enter upon other service as a means of livelihood for themselves, respectively, and their respective families; and by reason of the decision of said Supreme Court of the State of Illinois cannot recover their rights and the emoluments attaching to the exercise thereof, and the right of action claimed by said several parties is liable to become barred by the Statute of Limitations, unless this court shall, in the exercise of its high powers in the matter of compelling the due administration of justice and the law, give early hearing to this case and announce and declare truly the law and the legal rights of the petitioner herein. And plaintiff in error also asks the court to fix the time within which the parties hereto, respectively, shall file herein their Briefs and Arguments in this case. Charles T. Preston

A. B. Babcock

Attorney for Plaintiff in Error.

SUBJECT INDEX.

CASES CITED.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1911.

No. 474.

CHARLES T. PRESTON,

Plaintiff in Error,

vs.

THE CITY OF CHICAGO ET AL.,

Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS. FILED DECEMBER 30, 1910.

To John W. Beckwith,

Attorney for Defendants in Error:

Please take notice, that on Monday, June 3, 1912, at the opening of said court, or as soon thereafter as counsel can be heard, we shall present to said court, brief of argument of plaintiff in error in opposition to motion of defendants in error to dismiss writ of error or affirm judgment of the Supreme Court of Illinois, copy of which is hereto attached.

E. B. Chilcott

Stephen A. Day

Attorneys for Plaintiff in Error.

Received copy of the above notice this 31st day of May, A. D. 1912.

John W. Beckwith

Attorney for Defendants in Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1911.

No. 474.

CHARLES T. PRESTON,

Plaintiff in Error,

vs.

THE CITY OF CHICAGO *et al.*,

Defendants in Error.

IN ERROR TO THE SUPREME COURT OF ILLINOIS.

Filed, December 30, A. D. 1910.

BRIEF OF ARGUMENT, PLAINTIFF IN ERROR, IN OPPOSITION TO MOTION OF DEFENDANTS IN ERROR, TO DISMISS WRIT OF ERROR OR AFFIRM JUDGMENT OF SUPREME COURT OF ILLINOIS.

Now comes the plaintiff in error, in the above entitled cause, by counsel, and present to the Court abstract of record, statement and brief of argument in opposition to the motion of defendants in error, to dismiss the writ of error or affirm the judgment of the Supreme Court of Illinois.

Defendants in error, set up in their motion to dismiss said writ.

> "*First.* That there is no such federal issue involved in said cause as to give this court jurisdiction; and

Second. That the contentions of plaintiff in error, seeking to raise a federal issue in this cause, are so frivolous as not to need further argument."

In our reply in opposition thereto, we affirm and firmly believe.

First. That there are such federal questions involved in said cause as to give this Court jurisdiction; and

Second. That the contentions of plaintiff in error, in seeking to raise the said Federal questions, are meritorious; and that they, as we firmly believe, can be fully established, if counsel for plaintiff in error be permitted to fully present argument in favor thereof, to this Court.

In making our statement of the said cause of action, we desire to present to this Court all the salient and material facts in issue, as set forth in the pleadings, as briefly and concisely as we may, all of which are admitted by the general demurrer, filed thereto by the defendants in the trial court, defendants in error herein.

ABSTRACT OF RECORD.

This is a writ of error to the Supreme Court of inois, to review the judgment of that court, af- ning the judgment of the Superior Court of Cook unty, in said state, denying writ of mandamus the petitioner in said cause. The judgment was dered in the Superior Court of said Cook County, er a general demurrer to the original petition, l amended and supplemental petition filed there- had been sustained by said Superior Court.

The pleadings set up in the record, in said cause, ore this Court for review, show that, on the 11th of March, 1903, the petitioner, plaintiff in error ein, filed his petition in the Superior Court of Cook County, praying a writ of mandamus, to ore his name upon the roster of police patrol- in the department of police in the City of Chi- o, and upon the payroll thereof, and to certify name for the payment of his salary, from month nonth, as such police patrolman. That a general urrer was filed to the original petition filed ein, and thereafter, by leave of Court, first had, mended and supplemental petition was filed, said general demurrer filed as aforesaid, was ved, by the court, to stand to the said amended supplemental petition, and thereafter was sus- d by the said Superior Court, and the petitioner ng elected to stand by his said petitions, they dismissed, and a judgment for costs, was en- against him. That petitioner sued out this

writ of error to said Court to review said judgment, on the ground that *he was illegally and without warrant of law, wrongfully removed from the payroll of police patrolman*, in such department of police, and was then and there *illegally and without due process of law, deprived of his right to perform the duties or functions of his office, and to share in the Police Pension Fund, created under and by virtue of the Police Pension Fund Law.*

The salient and material facts set up in the original and amended and supplemental petitions, beginning at page 2 of the transcript of record herein, are as follows:

That the "City of Chicago" is, and has been for more than twenty years last past, a municipal corporation in said Cook County, and State of Illinois, incorporated and organized under an act of the Legislature of said State, entitled "an Act to provide for the incorporation of cities and villages, approved April 10, 1872, in force July 1, 1872, and existing subject to said act and the several acts amendatory thereof.

That Carter H. Harrison is now and ever since the month of April, 1897, has been the mayor of said City of Chicago, duly elected and acting as such mayor.

That from the 18th day of April, 1881, there has been and still is an "Executive Department of the Municipal Government of said City of Chicago," known as the department of police, which department was created by an ordinance of said City of Chicago; that by said ordinance said executive de-

partment was made to embrace "the superintendent of police, a secretary to said superintendent, one captain of police for each police district, and such number of lieutenants, detectives, sergeants, and police patrolmen as has been, or may be, prescribed by ordinance."

That by the ordinance, creating said "Executive Department," there was created the office of "Superintendent of Police," which superintendent, by provisions of said ordinance, was to be appointed by the mayor of said city, by and with the advice and consent of the city council of said city, on the first Monday in May, 1881, "or as soon thereafter as may be," and biennially thereafter.

That on the 1st day of June, 1886, your petitioner was a citizen of the United States, 39 years of age, and for more than two years next previous to said 1st of June, 1886, had been a resident of the City of Chicago, in said Cook County, Illinois, and was a qualified elector of said city, and had never been a defaulter to said municipal corporation. That on said 1st day of June, 1886, petitioner was duly appointed to the office of police patrolman in said department of police in said City of Chicago, took the oath of office prescribed for such police patrolman, and entered upon his duties as such police officer of said City of Chicago.

That on the 14th day of March, 1898, the superintendent of police of said City of Chicago, directed the name of petitioner to be dropped from the payroll of the policemen of said city, and the name of

petitioner was dropped from said payroll; that from thence hitherto the superintendents of police of the City have caused the name of petitioner to be omitted and excluded from the payroll of the police department of said city, and still so causes the name of petitioner to be omitted from said payroll. That the said conduct of the said superintendents, in so causing the name of petitioner to be omitted and excluded from the said payroll, was and is wholly unauthorized, invalid and contrary to and in disregard of the *legal rights* of petitioner.

That in consequence of the wrongful action of the said superintendents, in causing the omission of petitioner's name from the police payrolls of said city, petitioner has not been paid any portion of the salary accruing and due to him as a police officer as aforesaid, from said 14th day of March, A. D. 1898, until the present time.

That petitioner has made demand upon the said city, and upon the said Carter H. Harrison, mayor thereof, and upon the said Joseph Kipley, as superintendent of police of said city, while he was such superintendent, that petitioner's name should be restored to the police payrolls of said city, to the end that petitioner might draw the salary due him as such police officer, also the salary already accrued and due him, and the salary accruing to him as such police officer of said city, to which he was and is justly and lawfully entitled; but that the said city, the said Carter H. Harrison, as mayor thereof, and the said Joseph H. Kipley as superintendent of police thereof, respectively, refused to comply with

petitioner's reasonable and lawful demand in the premises and still refuse so to do. And in this behalf petitioner shows that under the provisions of the laws and ordinances of the said city the salary to which petitioner was and is lawfully entitled, from said 14th day of March, 1898, until the present time, was the sum of $83.33 per month.

That from the time of petitioner's appointment as a police officer of said city, until the said 14th day of March, A. D. 1898, *there had been and was deducted from his salary and paid into said Police Pension Fund by petitioner, under the provisions of existing laws, the sum of one per cent., from each and every monthly payment of salary accruing to your petitioner; and that under the provisions of said law petitioner was and is entitled to share in the benefits and advantages of said Police Pension Fund.*

That by Section 3 of the Civil Service Act of the State of Illinois (Rev. Stat. Ill. 1909, p. 442), it was expressly provided, and required as follows:

> "Said commissioners shall classify all the offices and place of employment in said city, with reference to the examinations hereinafter provided for, except those offices and places mentioned in Section 11, of this act. *The officers and places so classified by the commission shall constitute the classified civil service of said city.*"

That soon after the organization of said commission, in accordance with the terms of said act, the said commissioners classified the various offices and places of employment of said city.

That the first board of civil service commissioners, at the request of the chief executive officers of the said city, and the comptroller of said city, adopted the practice of passing upon and certifying all payrolls of the employes of said city, including the payrolls of all police patrolmen in the employ of said city, which practice has continued from thence hitherto; and it was then, and ever since has been, required by the comptroller of said city, and by said board of civil service commissioners, that all payrolls in said city, including the police payroll, should be so certified as a condition of payment thereof.

That by said certification it was declared by said board of civil service commissioners, that all persons whose names were upon said payrolls so certified, were entitled to be paid, as persons holding office under said Civil Service Act; that by the payment of said payrolls so certified, by the comptroller and other officers of said city, such officers and said city, admitted that all persons whose names were upon such payrolls, were occupying offices or places of employment under and according to the provisions of said Civil Service Act, and entitled to payment thereunder as being in the classified civil service of said city, under said act.

That for more than two years next prior to March 14, 1898, *petitioner was duly carried upon the police payrolls of said city, and from month to month was duly certified by said civil service commission, as a police patrolman entitled to pay as such, under said Civil Service Act.*

In the amended and supplemental petition it is alleged that on the 13th day of February, 1863, the People of the State of Illinois, represented in the General Assembly, duly passed an act to reduce the charter of the City of Chicago, and the several acts amendatory thereof into one act, and revised the same. That by different sections of Chapter X of said act, provisions were made establishing a department of police consisting in part of police patrolmen and providing that they be not removed without notice and hearing and for good cause only.

Said police force so continued under the control of the police board aforesaid, created by acts of 1863 and 1865, until the adoption by the Legislature of the State of Illinois, of the General Act to provide for the incorporation of cities and villages, approved April 10, 1872, and adopted by the City of Chicago, April 23, 1875.

That by said act it was amongst other things provided as follows:

> "Section 6. All courts in this state shall take judicial notice of the existence of all villages and cities organized under this act, and of the changes of the organization under this act; and from the time of such organization or change of organization the provisions of this act shall be applicable to such cities and villages, and all laws in conflict therewith shall no longer be applicable. But all laws or parts of laws, not inconsistent with the provisions of this act, shall continue in force and applicable to any such city or village, the same as if such change of organization had not taken place."

That by Section 1 of Article V of said act it was provided as follows:

> "The city council in cities and the president and board of trustees in villages shall have the following powers: * * *
>
> Sixty-six. To REGULATE the police of the city or village, and pass and enforce all necessary police ordinances. * * *
>
> Sixty-eight. To prescribe the duties and powers of a superintendent of police, policeman and watchman."

That on the 28th day of June, 1875, the city council of the City of Chicago duly passed an ordinance approved by the mayor, for the reorganization of the police department of said city, continuing said force as theretofore existing.

That on the 13th day of April, 1881, the city council of the City of Chicago duly passed an ordinance of said city creating the office of superintendent of police and giving him power to appoint all officers of the police force, with the concurrence of the mayor.

That the aforesaid provisions of said ordinance, continued in force until adoption by said city, of an Act of the Legislature of the State of Illinois, entitled "An Act to Regulate the Civil Service of Cities," the 25th day of March, 1895, and until the first day of July, 1895, when the then mayor of said City of Chicago, by his proclamation, declared the said act to be thereafter in full force and effect in said City of Chicago.

By said act, classification was made in part as follows:

> "2. Classified Service.—All other offices and

places of employment in said city under the provisions of said act, whether permanent, temporary or substitute, shall constitute the classified service. With reference to the examinations hereinafter provided for, they are hereby classified under two general classes, to be known as Class A and Class B, respectively. This classification is based mainly upon nature of employment. *The positions embraced in Class A will be chiefly those of a permanent character, while those in Class B will be more in the nature of temporary employment.*

3. Class A shall be known as the official service, and Class B shall be known as the labor service.

4. For convenience in designation, in carrying on examinations, certifying for appointments and promotions, and in making removals, the official service shall be divided into divisions based upon the character of the service to be performed, and each division shall be divided into grades, based upon amount of compensation. The several divisions of the official service shall be as follows. * * *

Division D.—Police Service.—All persons in the uniformed police force."

That all policemen in said city, including your petitioner, were, at the time of said classification, in the uniformed police force of said city, and by virtue of said act and rule of said commission and the classification thereunder, became and were classified in Division D of said official service of said City of Chicago, under said Civil Service Act, and thereupon the offices and places of employment so classified, by said commission, did "constitute the classified service of said city;" that by said provision, the classification of the offices of police patrolmen of said city, then and there held by them, the then

incumbents of said offices, including petitioner, then and there became police patrolman, de jure, in the classified service of said city, so continued from thence hitherto.

That the superintendent of police of said city, illegally and without warrant of law, directed the name of petitioner to be dropped from the payroll of police patrolman of said city, and that by and under such direction the name of petitioner was dropped from said payroll; *that such action was taken without any charges having ever been preferred against him, and without any trial of any charges of any nature preferred against him; nor was such action because of any alleged misconduct on his part; and said action was taken without the written concurrence of the then mayor of said city;* that from thence the said superintendent of police of said city, during his term of office, caused the name of petitioner to be omitted from the payroll of the police department of the said city; and every person duly appointed to the office of superintendent of police of said city, from the month of January, 1900, up to and including the present time, has still caused, and so causes, the name of petitioner to be omitted from said payroll; that said conduct of said superintendents of police in omitting the name of petitioner from said payroll, was and is a wrongful denying to petitioner of his *legal rights, as an enrolled police patrolman of said city under said Civil Service Act, to the emoluments of his said office, and was without due process of law.*

That the acts of the said superintendents of police of said City of Chicago, in directing the name of petitioner to be dropped from the payroll of police patrolmen of the said City of Chicago, as aforesaid, and in causing the name of petitioner then and thereafter to be omitted from the payroll of the police department of said city, *resulted in the denying to petitioner his legal right to share in the benefits of said fund, and was and is wholly unauthorized and without due process of law.*

That such action was and is contrary to Article 2 of the Constitution of the State of Illinois and Section 1 of Article XIV of the Amendments to the Constitution of the United States of America.

That the said petitioner insists that such action in continuing to omit the name of your petitioner from the payroll of said city, and in omitting the name of petitioner from the payroll of the police department of the said city, *had and has the effect to deprive petitioner of his right to exercise the functions and duties of a police patrolman as a member of the Classified Civil Service of said City of Chicago, and to receive and enjoy the salary pertaining to the office of police patrolman of said City, so held by him;* which claim of said defendants, and their conduct in the premises, was and is a wrongful denying to petitioner of his *legal rights and without due process of law.*

That all of the foregoing facts were admitted to be truly stated by the general demurrer filed thereto by the defendants in said cause.

For the convenience of the Court we quote from the Statutes of the State of Illinois, the so-called Police Pension Fund Law. (Revised Statute of Illinois (Hurd), 1905, pp. 378, 379 and 380.)

We will specially call attention to Section 1, 3, 4 and 5 of said act.

"Section 1. That in each city, village incorporated towns in this state, having a population of 50,000 inhabitants or more, there shall be set apart the following moneys to constitute a police pension fund:

* * * * *

Third. All moneys paid for special details of *police officers.*

Fourth. One per cent per month, which shall *be paid* or deducted from the pension of each and every police pensioner of such city, village or town.

* * * * *

Eleventh. One per cent per month, which shall *be paid or deducted from the salary of each and every member of the police department of such city, village or town: provided, no such member shall be compelled to pay more than* $1.00 *per month from his salary.*

* * * * *

Section 3. Whenever any person at the time of the taking effect of said act, to which this is an amendment, or thereafter shall be duly appointed and sworn, and have served for the period of twenty years or more upon the regularly constituted police force of such city, village or town of this state, subject to the provisions of this act, or where the combined years of service of any person upon the police force and the fire department, as aforesaid, of such city, village or town of this state, shall aggregate twenty years or more, said board shall order and direct that such person, after becoming fifty years of age and his services on such police force shall

have ceased, and all officers entitled to and having a pension under said act, to which this is an amendment, after the taking effect of this act, shall be paid from such fund, a yearly pension equal to one-half the amount of salary attached to the rank which he may have held on said police force for one year immediately prior to the time of such retirement; provided, however, the maximum of said pension shall not exceed the sum of $900 and the minimum not less than $600. And after the decease of such member his widow or minor child or children under sixteen years of age, if any survive him, shall be entitled to the pension, provided for in this act, of such a deceased husband or father; but nothing in this or any other section of this act shall warrant the payment of any annuity to any widow of a deceased member of said police department after she shall have remarried. *And provided further that all police officers retired after twenty years' service in the police department of such city, village or town, * * * and who are above the age of fifty years now on the police pension rolls shall receive the same pension now allowed them.* Provided, that in no case shall said pension exceed the sum of $900. (As amended by act approved and in force May 16, 1903.)

Section 4. *Whenever any person, while serving as a policeman, in any such city, village or town, shall become physically disabled while in and in consequence of the performance of his duties as such policeman, said board shall upon his written request, or without such request, if it deem it for the good of said police force, retire such person from active service, and order and direct that he be paid from said fund a yearly pension not exceeding one-half the amount of the salary attached to the rank which he may have held on said police force at the time of his retirement;* Provided, that the maximum sum of such pension shall not exceed the sum of $900

per year; and the minimum not less than $600: *Provided, further, that whenever such disability shall cease such pension shall cease.* (As amended by act approved and in force May 16, 1903.)

Section 5. *No person shall be retired as provided in the next preceding section, or receive any benefits from said fund unless there shall be filed with said board certificates of his disabilities, which certificates shall be subscribed and sworn to by said person and by the police surgeon (if there be one) and two practicing physicians of such city, village or town, and such board may require other evidence of disability before ordering such retirement and the payment aforesaid.* (Revised Statutes of Illinois (Hurd) 1905, pp. 378, 379 and 380.)

STATEMENT.

The motion of defendants in error is based upon the grounds, first, that there is no Federal question in the case, and, second, that the contentions of plaintiff in error seeking to raise a Federal question in this case are so frivolous as not to need further argument.

There is no possible doubt but that there was a Federal right specially set up and denied by the State Court. In its opinion it has said:

> "Third. That the removal of petitioner without notice of written charges preferred against him and being afforded an opportunity to be heard was a denial to him of due process of law, in violation of Section 2 of Article II of the constitution of the State of Illinois and Section 1 of the Fourteenth Amendment of the Constitution of the United States. This question was passed upon and decided contrary to petitioner's contention in *People* v. *City of Chicago, supra, McNeill* v. *City of Chicago, supra, Kenneally* v. *City of Chicago, supra,* and *Donahue* v. *County of Will,* 100 Ill., 94."

It thus appears that the Constitution of the United States was invoked to protect the right of the petitioner arising therefrom. This, we submit, disposes of the contention that there is no Federal question in the case. *The writ of error was allowed by the State Court.* (Transcript, p. 29.)

The petition for a writ of mandamus relied, first, upon petitioner's rights as a police officer of the City of Chicago and a duly certified and enrolled officer in full standing under the Civil Service Act of the State of Illinois; and, second, upon his rights under

the Police Pension Fund Act of the State of Illinois under which he had paid a percentage of his salary monthly for ten years and which law had been in no way repealed but was and is in full force and effect. The opinion of the Supreme Court of Illinois disposes of both these contentions in the language just above quoted. It thus appears that one Federal question in the case was distinctly and expressly passed upon in the opinion of the State Court and the other (the pension fund question) was not given specific mention.

BRIEF OF ARGUMENT.

It is well settled under the decisions of this Court that a motion to dismiss will be denied where a claim of Federal right under the Constitution of the United States has been specially set up and denied by the decision of the State Court, whether such question appears to have been expressly passed upon or must have been denied by the State Court in reaching its conclusion.

Missouri K. & T. R. Co. v. *Elliott*, 184 U. S., 30.

Kaukauna Co. v. *Green Bay & Canal Co.*, 142 U. S., 254.

Detroit, etc., Ry. v. *Osborn*, 189 U. S., 383.

Schlemmer v. *Buffalo, Rochester, etc., Ry.*, 205 U. S., 1, 11.

Terre Haute & Indianapolis R. R. Co. v. *Indiana*, 194 U. S., 579.

Louisville Gas Co. v. *Citizens Gas Co.*, 115 U. S., 683, 697.

Chicago Life Ins. Co. v. *Needles*, 113 U. S., 574, 579.

Bohanan v. *Nebraska*, 118 U. S., 231.
West Chicago R. R. v. *Chicago*, 201 U. S., 506, 519, 520.

This doctrine is so fully recognized that we will only quote from the last case just above cited (*West Chicago Railroad* v. *Chicago, supra*):

> "The contention of the city that the writ of error should be dismissed for want of jurisdiction in this court cannot be sustained. It is true that the judgment of the State Court rests partly upon the grounds of local or general law. But, by its necessary operation—although the opinion of the State Court does not expressly refer to the Constitution of the United States—the judgment rejects the claim of the company, specially set up in its answer, that the relief asked by the city cannot in any view of the case, be granted consistently, either with the contract clause of the Constitution or with the clause prohibiting the state from depriving anyone of his property without due process of law. If that position be well taken, then a judgment based merely upon grounds of local or general law would be error; for, the Federal questions arose covering the whole case, and are of such a nature that the rights of the parties could not be finally determined without deciding them. As the judgment, by its necessary operation, denied the company's claims based on the Constitution of the United States, this Court had jurisdiction to inquire whether those claims are sustained by that instrument. Our views on this question are fully stated in *Chicago, Burlington & Quincy R. R. Co.* v. *Drainage Commissioners*, 200 U. S., 561."

In *Detroit, etc., Ry.* v. *Osborn, supra*, which was a petition for a writ of mandamus setting forth a claim of a denial of due process of law under the

Constitution of the United States, similar to the petition in the case at bar, it was said:

> "A motion is made to dismiss the writ of error on the ground that the record exhibits no Federal question. The motion is denied. The plaintiff claimed and set up a right under the Constitution of the United States and the decision of the Supreme Court of the State was tantamount to the denial of that right. *Kaukauna Co.* v. *Green Bay & Canal Co.*, 142 U. S., 254."

As to the second ground of the motion that the Federal question in this case is so frivolous as not to need further argument, we deem it necessary for the purposes of this motion only to refer to the fact that petitioner was duly certified and enrolled under the Civil Service Act of the State of Illinois as one of the uniformed police of the City of Chicago and as such was paid by said city. It is contended that such certification did not operate to confer upon petitioner the office of police patrolman and that it has no bearing upon the question as to whether petitioner was a *de jure* officer. But petitioner need not have been a technical officer—he could not be deprived of his rights acquired by the certification and enrollment without due process of law.

United States ex rel. Turner v. *Fisher* (Dec. 4, 1911), 222 U. S., 204.

Garfield v. *United States*, 211 U. S., 249.

To reach this conclusion the Supreme Court of Illinois saw fit to take a position contrary to that of this Court in the case of *United States* v. *Wickersham*, 201 U. S., 390, and we quote the following language from the opinion (p. 397) therein:

"On September 26, 1896, under the extension order referred to and the action of the Secretary of the Interior, the acting Secretary of the Interior filed a list of positions and employés with the Civil Service Commission, which, among others, in the list of employés in the offices of surveyors-general, contained the name of the appellee as a stenographer and typewriter, the date of his appointment, salary and residence, as stated in the findings of fact. By the action recited on the part of the President and the head of the Department of the Interior, Wickersham was brought within the protection of the law and the President's order afforded to persons duly entered in the classified Civil Service. While he may not technically have been an officer of the United States with a fixed term and compensation, he certainly was within the subordinate places provided for in the statute, and within the 'employes outside the District of Columbia,' covered by the President's order of May 6, 1896. That order expressly included officers and employes, whether compensated by a fixed salary or otherwise, serving in a clerical capacity or whose duties were in whole or in part of a clerical nature. The Secretary of the Interior certified the name of the claimant to the Civil Service Commission as an employe in the office of the surveyor-general, within the terms of the statutes and the Executive order. He was therefore, entitled to the protection of the President's order of July 27, 1897 (14 Ann. Rep. Civ. Serv. Comm. 133); 'no removal shall be made from any position subject to competitive examination except for just cause and upon written charges filed with the head of the department or other appointing officer, and of which the accused shall have full notice and an opportunity to make defense.'

"If the contention of the Government be correct and the attempted suspension by the surveyor-general was equivalent to a dismissal from

> office, such action would run counter to the requirements of the Presidential order just quoted. The action of the surveyor-general was not upon written charges, and no notice or opportunity to make defense was given to the accused, as provided in that order. The appellee being entitled to the protection of this order, and to have notice of the charges preferred, and an opportunity to make defense, the attempted removal, if such it was, was without legal effect; nor can we find any authority, statutory or otherwise, authorizing the suspension in the manner undertaken in this case."

The Federal question presented is whether the decision of the State Court permitting petitioner to be deprived of his *rights* as a policeman in good standing and with ability to perform the duties of his office, without a hearing and without charges preferred against him, is not a denial of due process of law, the equal protection of the laws and the abridgment of his privileges and immunities as a citizen of the United States. In other words, does not the Fourteenth Amendment of the Constitution of the United States guarantee to petitioner the right to have charges preferred against him and to be heard in his defense, before striking his name from the rolls—rights which were specially set up and prayed for in the petition? Is not a system of laws which will permit a policeman to be thus deprived of his rights under sanction of State authority wanting in due process of law, does it not deny to him the equal protection of the laws, and abridge his privileges and immunities as a citizen of the United States and of the State of Illinois?

As this Court said in *Garfield* v. *United States*, 211 U. S., 249:

> "It has always been recognized that one who has acquired rights by an administrative or judicial proceeding cannot be deprived of them without notice and an opportunity to be heard. The right to be heard before property is taken or rights or privileges withdrawn, which have been previously legally awarded is of the essence of due process of law."

The action of the State Court in denying the petitioner his Federal rights are sought to be supported upon the theory that no property right is involved and the case of *Donahue* v. *Will County*, 100 Illinois, 94, is cited. In answer to this contention, it is only necessary to refer to the fact that Section 2 of Article II of the Constitution of the State of Illinois was before the Court in that case, and no question or construction of the Fourteenth Amendment of the Constitution of the United States. Whatever may have been said by the Supreme Court of Illinois in regard to what constitutes property within the meaning of the Illinois Constitution is not decisive of that question in this Court, for reasons which are obvious and entirely well understood.

In a consideration of civil rights under the Fourteenth Amendment no definite rule has ever been announced, but Mr. Justice Miller's process of "inclusion and exclusion" has been applied. Whether under the petition now before the Court there has been any deprivation of Federal rights cannot be determined without a full consideration of all the facts and surrounding circumstances. It is therefore idle to attempt to urge this Court to deny a full hear-

ing to plaintiff in error merely because of what the State Court decided was the proper interpretation of its own Constitution.

As to the second Federal question presented, that covering the claim under the Police Pension Fund Act, we desire to emphasize the fact that the statute in express terms mentions "police officers" and that its provisions are in favor of such officers. The petition sets up that the plaintiff in error is such a police officer as is mentioned by the statute, the allegation is well pleaded, and, therefore, admitted by the demurrer interposed on behalf of defendants in error.

We have been successful in discovering that the exact question now before the Court was decided by this Court in the case of *Pennie* v. *Reis*, 132 U. S., 464, wherein was presented a consideration of the California Police Pension Act. The California statute in that case differs from the statute pleaded in this case inasmuch as the salary of the policeman in the California Act was fixed by the State as well as the amount to be retained each month for the pension fund, whereas under the Illinois statute, *the policeman is required to pay out of his salary*, one per cent per month and in no case over three dollars per month, and nothing is said as to the amount of his salary. **In Illinois the salary is fixed by the city.** Furthermore, there has been no repeal in any way of the provisions of the Illinois Pension Act and the question as to the effect of a repealing statute upon rights not vested is not in this case. At the outset of the opinion delivered by Mr. Justice Field (p. 469) it is said:

"It was contended in the Court below that this later Act of March 4, 1889 violated that provision of the Constitution of the United States, and of the State, which declares that no person shall be deprived of his property without due process of law."

And in speaking of the rights of the petitioner under the California statute it is said (p. 471):

"Being a fund raised in that way, it was entirely at the disposal of the Government, until, by the happening of one of the events stated—the resignation, dismissal, or death of the officer—the right to the specific sum promised became vested in the officer or his representative. It requires no argument or citation of authorities to show, that in making a disposition of a fund of that character, previous to the happening of one of the events mentioned, the State impaired no absolute right of property in the police officer. The direction of the State, that the fund should be one for the benefit of the police officer or his representative, under certain conditions, was subject to change or revocation at any time, at the will of the Legislature. There was no contract on the part of the State that its disposition should always continue as originally provided. Until the particular event should happen upon which the money, or a part of it, was to be paid there was no vested right in the officer to such payment. His interest in the fund was, until then, a mere expectancy created by the law, and liable to be revoked or destroyed by the same authority. The law of April 1, 1878, having been repealed before the death of the intestate, his expectancy became impossible of realization; the money which was to pay the amount claimed had been previously transferred and mingled with another fund, and was no longer subject to the provisions of that Act. Such being the nature of the intestate's interest in the fund pro-

vided by the law of 1878, there was no right of property in him of which he or his representative has been deprived.

If the two dollars a month, retained out of the alleged compensation of the police officer, had been in fact paid to him, and thus become subject to his absolute control, and after such payment he had been induced to contribute it each month to a fund on condition that, upon his death, a thousand dollars should be paid out of it, to his representative, a different question would have been raised, with respect to the disposition of the fund, or at least of the amount of the decedent's contribution to it. Upon such a question we are not required to express an opinion. It is sufficient that the two dollars retained from the police officer each month, though called in the law a part of his compensation, were in fact, an appropriation of that amount by the State each month to the creation of a fund for the benefit of the police officers named in that law, and, until used for the purposes designed, could be transferred to other parties and applied to different purposes by the Legislature."

The opinion of the State court in the case at bar is silent as to petitioner's rights under the Police Pension Fund Act of the State of Illinois. That such court, however, recognizes that police officers exist and are entitled to the benefits of this act has been expressly decided by said court in the case of *Morgan* v. *People*, 296 Ill., 437, wherein it has said (p. 444):

"The facts relating to the claims of the appellees other than Margaret Morgan are not set out or mentioned in the abstract or briefs, and in our consideration of the case we will confine ourselves to the facts as disclosed and relating to the case of the appellee, Mrs. Mor-

gan. James Morgan, her husband, was a police officer of Chicago more than twenty years and was upwards of fifty years of age on November 30, 1891, and was retired as of that date from active duty on a pension of $50.50 a month, under the Act of 1887."

And, further, on page 145, it is said:

"We may say the act went further, and preserved the rights not only of the officers in active service, but all the officers drawing pensions under retirement by virtue of the Act of 1887."

It is said in the opinion (p. 149):

"A pension is a bounty springing from the graciousness and appreciation of sovereignty. It may be given or withheld at the pleasure of a sovereign power. Because one is placed upon a pension roll under a faulty law is no reason why that law may not be repealed and the pension cease."

Defendants in error cite this language as sufficient to show that there is no Federal right denied to petitioner by the decision of the State Court. But the absurdity of such a contention is at once apparent when we consider that the petitioner was not deprived of his rights under this act, whatever they were, in accordance with due process of law. Whether the proceedings taken by the defendants in error amounted to due process of law must be determined by this Court for itself, since the jurisdiction of this Court has been properly invoked by the petitioner. Upon this point we desire only to refer to a single case, *Louisville Gas Co. v. Citizens Gas Co.*, 115 U. S., 683, 696. The following is quoted from the opinion by Mr. Justice Harlan:

"The language of this statute is too plain to need interpretation. * * * As this question is at the very foundation of the inquiry whether the defendant had a faulty contract with the state, the obligation of which has been impaired by subsequent legislation, we cannot avoid its determination. Whether an alleged contract arises from state legislation, or by agreement with the agents of a state, by its authority, or by stipulations between individuals exclusively, we are obliged, upon our own judgment and independently of the adjudication of the State Court, to decide whether there exists a contract within the protection of the Court of the United States. *Jefferson Branch Bank* v. *Skelly*, 1 Black, 436; *Wright* v. *Nagle*, 101 U. S., 791, 794; *Louisville & Nashville R. R.* v. *Palmes*, 109 U. S., 254, 257. After carefully considering the grounds upon which the State Court rests its conclusion, we have felt constrained to reach a different result."

Also to the following, taken from the opinion of this Court in *Chicago Life Ins. Co.* v. *Needles*, 113 U. S., 574, 579:

"The Supreme Court of Illinois did not, in terms, pass upon the claim distinctly made there, as in the Court of original jurisdiction, that the statutes in question were in derogation of rights and privileges secured to appellant by the Constitution of the United States. But the final judgment necessarily involved an adjudication of that claim; for, if the statutes upon the authority of which alone the auditor of the state proceeded, are repugnant to the National Constitution, that judgment could not properly have been rendered. This Court, therefore, has jurisdiction to inquire whether any right or privilege protected by the Constitution of the United States has been withheld or denied by the judgment below. And our

jurisdiction is not defeated, because it may appear, upon examination of this Federal question, that the statutes of Illinois are not repugnant to the provisions of that instrument. Such an examination itself involves the exercise of jurisdiction. The motion to dismiss the writ of error upon the ground that the record does not raise any question of a Federal nature must, therefore, be denied."

The case of *Schlemmer* v. *Buffalo, Rochester, etc., Ry.*, 205 U. S., 1, is also very instructive upon this point, and we desire to quote the following from the opinion by Mr. Justice Holmes (p. 11):

"We certainly do not mean to qualify or limit the rule that, for this Court to entertain jurisdiction of a writ of error to a State Court, it must appear affirmatively that the State Court could not have reached its judgment without tacitly, if not expressly, deciding the Federal matter. *Bachtel* v. *Wilson*, Jan. 7, 1907, 204 U. S., 36. But, on the other hand, if the question is duly raised and the judgment necessarily, or by what appears in fact, involves such a decision, then this Court will take jurisdiction, although the opinion below says nothing about it. *Kaukauna Water Power Co.* v. *Green Bay & Miss. Canal Co.*, 142 U. S., 254. And if it is evident that the ruling purporting to deal only with local law has for its premise or necessary concomitant a cognizable mistake, that may be sufficient to warrant a review. *Terre Haute & Indianapolis R. R. Co.* v. *Indiana*, 194 U. S., 579."

And to the following quoted from page 587 of the opinion by the same eminent justice in the case last cited:

"We are driven to a different construction of the charter, notwithstanding the deference

naturally felt for the decision of a State Court upon state laws. The language is plain."

And on page 589 thereof the following:

"We are of opinion that we cannot decline jurisdiction of a case which certainly never would have been brought but for the passage of flagrantly unconstitutional laws, because the State Court put forward the untenable construction more than the unconstitutional statutes in its judgment. To hold otherwise would open an easy method of avoiding the jurisdiction of this Court. *Louisville Gas Co.* v. *Citizens Gas Co.*, 115 U. S., 683, 697."

We insist that the provisions of the pension law are plain and clear and that petitioner was a police officer within the meaning of that act and cannot be deprived of his Federal rights thereunder by any decision of the State Court that he is not such officer. We insist that this is a cognizable mistake and cannot and should not be followed by this Court. Upon that question the opinion of the Supreme Court of Illinois is silent and it has seen fit to dismiss the petition without specifically passing upon it otherwise than as included within the general deduction that petitioner is not a police officer. If he is not a police officer within the meaning of the Pension Act, who are meant by these words in that Act? If ever language was plain, clear and unmistakable, then the reference to police officers under the Pension Act includes petitioner. Furthermore, for ten years he has paid each month from his salary a certain percentage into that fund under the expectation that he would be entitled eventually to the provisions for his benefit in said Act; and that

the city would proceed under the provisions and by the method provided in the Act, if his dismissal were sought. As we have mentioned before, this Act has not been repealed but is in full force and effect within the State of Illinois. To attempt to overcome the effect of plain language which distinctly mentions and includes within its phraseology police officers, by saying that there is no such thing as a police officer in Illinois, is so arbitrary and unfounded as to entitle it to be disregarded by this Court. Certainly such a conclusion by the Supreme Court of Illinois will not conclude this Court in passing upon the Federal question in the record clearly set up and as clearly denied by the Supreme Court of Illinois, not in express terms but none the less deadly because of its silence upon that point.

It is argued, in the brief of defendants in error upon this motion, that the decision of the State Court is rested upon an independent non-federal ground sufficient to sustain the judgment, and that, therefore, this court is not called upon to consider the Federal questions in the case. The basis of this contention is that the State Court included within its opinion a holding that plaintiff in error was guilty of "laches."

We do not question the decisions which hold that this court is concluded by the decision of the State Court in an equity suit as to whether or not certain facts render complainant guilty of laches. The cases cited by defendants in error are of that character. But the so-called "laches" in this case are not laches at all and the claim is unfounded and entirely un-

sound. Furthermore, there is no independence furnished upon which such a claim can be founded. The question which the State Court desired to characterize as "laches" is really one of discretion, and the granting of the writ is considered to be a matter of discretion with the court, and furthermore, the judgment of that court is not rested upon this claim.

In Illinois *mandamus* is a statutory remedy, is a civil action by a statute enacted in 1874 (Rev. Stat. Ill. (1909), Ch. 87, p. 1161) entitled "An Act to revise the law in relation to mandamus," providing that upon the filing of a petition for a mandamus the clerk of the court shall issue a summons commanding the defendant to appear at the return term thereof and show cause why a writ of mandamus should not be issued against him.

We quote the following pertinent sections from the statute:

> "4. PLEADINGS. Section 4. The petitioner may plead to or traverse all or any of the material facts contained in the answer, or demur thereto, to which the defendant shall reply, take issue or demur, and like proceedings shall be had *as in other cases at law*."
>
> "8. SUIT NOT TO ABATE FOR DEATH, ETC. Section 8. The death, resignation or removal from office, by lapse of time or otherwise, of any defendant, shall not have the effect to abate the suit, but his successor may be made a party thereto, and any peremptory writ may be directed against him."
>
> "9. SUIT NOT DISMISSED FOR BETTER REMEDY—AMENDMENTS. Section 9. The proceedings for a writ of mandamus shall not be dismissed nor the writ denied because the petitioner may have

another specific legal remedy, where such writ will afford a proper and sufficient remedy; and amendments may be allowed *as in other civil suits.*"

"10. APPEALS—WRITS OF ERROR. Section 10. Appeals and writs of error may be taken and prosecuted in the same manner, upon the same terms, and with like effect *as in other civil cases.*"

Civil actions in Illinois are regulated by the following provision in the Statute of Limitations of that state (Rev. Stat. Ill. (1909), Ch. 43, p. 1446):

"And all civil actions not otherwise provided for shall be commenced within five years after the cause of action accrues."

At this point we desire to call attention to the fact that the limitation statute was passed in 1872 and the Act to revise the proceedings in *mandamus* in 1874.

The opinion in the case at bar does not pass upon the so called question of "laches" except by reference to the cases of *Kennedy* v. *City of Chicago*, 220 Ill. 485, and *Schaltheis* v. *City of Chicago*, 240 Ill., 167. In the *Schaltheis* case, no mention is made of the Statute of Limitations or of "laches" so that this reference is clearly an inadvertence on the part of the State Court. In the *Kennedy* case, it was decided that the delay of *more* than the statutory period (five years) could be considered as fatal, but the contention of petitioner, that *mandamus* is a civil action under the laws of Illinois and is governed by the Statute of Limitations applicable thereto, is treated as follows (p. 505):

"The theory of this contention is that, if the doctrine of laches is applied, it must follow the

period fixed by the Statute of Limitations, and that the Statute of Limitations applicable to such cases is said by counsel for appellant to be the five years' statute of limitations. In support of this decision, the latter clause of Section 15 of this limitation Act is invoked which reads as follows:

'And all civil actions not otherwise provided for shall be commenced within five years next after the cause of action accrues.' (2 Starr & Curt. An. Stat., 2nd Ed., p. 2625.)

Without passing any opinion upon the correctness of the contention of counsel upon this subject, it may be admitted, for the purposes of this case, that a delay of five years must have occurred in order to substantiate the charge of laches against the appellant."

And at the conclusion of the opinion it is said:

"Inasmuch, therefore, as appellant has waited more than five years before filing a petition for mandamus, which sets up a good cause of action, * * * we are of the opinion that the appellant has been guilty of such laches, as authorized the Circuit Court to refuse to grant the writ."

The delay in the case just mentioned was *more than six years* and the previous decisions of the State of Illinois to the effect that *mandamus* is a civil action and is governed by the pertinent section of the statute of limitations above quoted are not questioned.

It has been held in Illinois in unmistakable terms that *mandamus* is a civil action.

Langan v. *Drainage District*, 239 Ill., 430, 438.

Cleary v. *Hoobler*, 207 Ill., 97, 99.

Mayor of Roodhouse v. *Briggs*, 194 Ill., 435.

Chicago Great Western Ry. Co. v. *People*, 179 Ill., 441.

It is said in *Langan* v. *Drainage District, supra* (a *mandamus* case):

> "With reference to the Statute of Limitations, it is only necessary to say this is an action at law and is governed by the rules of pleading applicable to other actions at law. (Citing cases.) In such actions the Statute of Limitations cannot be availed of by demurrer but must be specially pleaded, so that the plaintiff may reply on special matter which prevents the bar from attaching. (*Gunton* v. *Hughes*, 181 Ill., 132; *Wall* v. *Chesapeake & Ohio R. R. Co.*, 200 Ill., 66.)"

This being so by statute and also by judicial decision there is no question that the limitation statute operates upon *mandamus* proceedings in Illinois.

The State Court can not make another or different limitation period apply to the case at bar. It was decided by this court, in *Amy* v. *Watertown* (No. 2), 130 U. S., 320, 323, that the statute, as written, must prevail. We quote the following language from the opinion by Mr. Justice Bradley:

> "The question, therefore, is, whether the courts can create another exception, not made by the statute, where the party designedly eludes the service of process? Have the courts the power thus to add to the exceptions created by the statute? * * * The observation is undoubtedly correct; but the cases in which it applies are very limited in character, and are to be admitted with great caution; otherwise the court would make the law instead of administering it. The general rule is that the language of the act must prevail, and no reasons based on apparent inconvenience or hardship can justify a departure from it."

In some jurisdictions *mandamus* is not a civil action. An interesting discussion of this question is found in the case of *Duke* v. *Turner*, 204 U. S., 623, 628, and we quote the following from the opinion in that case:

> "The authorities are much in conflict as to whether a statute of limitations, without express words to that effect, governs a proceeding in *mandamus* as though it were an ordinary civil action. Some of the cases hold that the statute of limitations applies which would govern an ordinary action to enforce the same right.
>
> Other cases hold that the statute of limitations does not apply as it would to ordinary civil actions, but the relator is only barred from relief where he has slept upon his rights an unreasonable time, particularly when the delay has been prejudicial to the rights of the respondent. The cases *pro* and *con* are collected in a note to Section 30-b. High, Extraordinary Legal Remedies, 3d ed."

It was decided by this court in the case just mentioned that under the laws of Oklahoma Territory, *mandamus* was not a civil action and the various provisions of the local statutes are examined to arrive at a correct solution of the question presented. An examination of the text quoted from shows that where the proceeding is made a civil action by statute, the statute of limitations governing other civil actions applies and the case of *Board of Supervisors* v. *Gordon*, 82 Ill., 435, is cited in support of that view. For other cases to the same effect we desire to call the attention of the court to

People v. *Town of Oran*, 121 Ill., 650.

Meents v. *Reynolds*, 62 Ill. App., 17.

Town of Oran v. *The People*, 19 Ill. Apps. 174.

Irrespective of the decisions, it is so clearly regulated and provided by the statute of 1874, from which we have quoted, that there is no possible escape from the plain meaning of the language therein employed that in Illinois *mandamus* is a civil action.

There is no possible claim of "laches" as to the pension fund question. That part of the case was avoided by the State Court, further evidence that such claim is clearly untenable.

Having established, as we trust, that *mandamus* is a civil action or an action at law, we feel confident in saying that *laches* plays no part and cannot be considered in this connection. It was held by this Court in the case of *Wehrman* v. *Conklin*, 155 U. S., 314, 326, as follows:

> "It is scarcely necessary to say that complainants cannot avail themselves *as a matter of law* of the laches of the plaintiff in the ejectment suit. Though a good defense in equity, laches is no defense at law. If the plaintiff at law has brought his action within the period fixed by the statute of limitations, no court can deprive him of his right to proceed."

The opinion proceeds to explain that if the limitation period were twenty-one years plaintiff could wait twenty years and eleven and a half months before proceeding and the defendant could make nothing of the delay. To the same effect is *Abraham* v. *Ordway*, 158 U. S., 422.

We, therefore, insist that the so-called independent ground is not independent, is unsound and the decision of the State Court is not rested upon it. The claim of laches, in equity, concedes the existence and validity of a right, but says that delay in assert

ing it is fatal. The gist of plaintiff in error's action is the right acquired by enrollment on the part of the Civil Service Commission and as to it, the State Court expressed no opinion.

With the law in Illinois in the condition in which we have shown it to have been, when plaintiff in error's petition was filed, there is no force in the claim of "laches." His action was governed by the statutory period of five years, and there being this period of repose, he was entirely justified to delay instituting suit so long as there was no expiration of such period.

Furthermore, it has been held in Illinois that the statute of limitations must be raised by plea and cannot be urged upon demurrer for the reason that the plaintiff can have an opportunity to overcome the effect of the plea if made. A special demurrer will lie if the declaration contains matter in avoidance set up in advance of a plea of the statute of limitations. (*Longan* v. *Drainage District*, *supra*.)

The injustice to be visited upon petitioner if the doctrine of laches is to be arbitrarily injected into this case is at once apparent. We feel that we have demonstrated that the so called claim of "laches" is too weak and thin to constitute a ground for defeating the jurisdiction of this Court. If the statute of limitations had been pleaded in the lower court, petitioner would have had an opportunity to show matter in resistance to the plea.

Where there is a clear Federal question in the case and the attempt is made to defeat the jurisdiction of this Court by a claim of an independent

ground of local or general law sufficient to sustain the judgment, this Court will examine such question to see whether it is sound and well founded. And the State Court cannot arbitrarily inject such a ground into its opinion to defeat the jurisdiction of this Court.

Leathe v. *Thomas*, 207 U. S., 93, 99.
Johnson v. *Risk*, 137 U. S., 300, 307.
Terre Haute & Indianapolis R. R. Co. v. *Indiana*, 194 U. S., 579.

In conclusion, we respectfully request that plaintiff in error be given a full and fair opportunity to present the merits of his petition before this Court. The Federal questions presented have been properly raised and are meritorious, and the argument will demonstrate the absolute soundness of the contentions made by the plaintiff in error. The decision of the State Court in denying the Federal rights set up is founded upon a misconception and a narrow view of the guaranties of the Federal Constitution. The Federal questions, clearly presented, prevent the writ of error from being dismissed, and we desire to be heard before the judgment of the State Court is affirmed.

Respectfully submitted,

A. B. Chilcoat,
Stephen A. Day,
Attorneys for Plaintiff in Error.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1910.

No. ~~444~~ 195.

CHARLES T. PRESTON,
Plaintiff in Error,

vs.

THE CITY OF CHICAGO et al.,
Defendants in Error.

Brief of Argument and Argument of Plaintiff in Error.

A. B. CHILCOAT,
Attorney for Plaintiff in Error.

22,461.

Geo. Hornstein Co., Printer, Chicago.

Supreme Court of the United States

OCTOBER TERM, A. D. 1910.

No. 840.

CHARLES T. PRESTON,
Plaintiff in Error,

vs.

THE CITY OF CHICAGO et al.,
Defendants in Error.

Brief of Argument and Argument of Plaintiff in Error.

Your petitioner, Charles T. Preston, of the City of Chicago, in the said county, respectfully represents and states to said court as follows:

That the "City of Chicago" is, and has been for more than twenty years last past, a municipal corporation in said Cook County, and State of Illinois, incorporated and organized under an act of the Legislature of said state, entitled "an Act to provide for the incorporation of cities and villages, approved April 10, 1872, in force July 1, 1872, and existing subject to said act and the several acts amendatory thereof.

That Carter H. Harrison is now and ever since the month of April, 1897, has been the mayor of said City of Chicago, duly elected and acting as such mayor.

That from the 18th day of April, 1881, there has been and still is an "Executive Department of the Municipal Government of said City of Chicago," known as the department of police, which department was created by an ordinance of said City of Chicago and by which ordinance said executive department was made to and does embrace "the superintendent of police, a secretary to said superintendent, one captain of police for each police district, and such number of lieutenants, detectives, sergeants, and police patrolmen as has been, or may be, prescribed by ordinance."

That by the ordinance creating said "Executive Department" there was created the office of "Superintendent of police," which superintendent, by provisions of said ordinance, was to be appointed by the mayor of said city, by and with the advice and consent of the city council of said city, on the first Monday in May, 1881, "or as soon thereafter as may be," and biennially thereafter.

That Joseph Kipley was on, to-wit, the first Monday of May, 1897, duly appointed by the mayor of said City of Chicago, as such superintendent of police of said City of Chicago, until the 30th day of April, 1900, when he resigned said office and Francis O'Neil was duly appointed as such superintendent of police, which office he still holds.

That on, to-wit, the 1st day of June, 1886, your

petitioner was a citizen of the United States, 39 years of age, and for more than two years next previous to said 1st of June, 1886, he had been a resident of the City of Chicago, in said State of Illinois, and was a qualified elector of said city, and had never been a defaulter to said municipal corporation, said City of Chicago. That on, to-wit, said 1st day of June, 1886, your petitioner was duly appointed to the office of police patrolman in said department of police in said City of Chicago, and thereupon he took the oath of office prescribed for such police patrolman to take, and at once entered upon his official duties as such police officer of said City of Chicago.

That your petitioner served continuously as such police patrolman from said 1st day of June, 1886, until, to-wit, the 14th day of March, 1898, and hath remained such police patrolman from thence hitherto.

That on, to-wit, December 18, 1897, by direction of the then superintendent of police (said Joseph Kipley), your petitioner took what is called the civil service examination as to his qualifications for the office of policeman of said City of Chicago, which examination was conducted by and under the direction of the civil service commissioners of the City of Chicago (said City of Chicago having theretofore duly adopted the "Civil Service Act" so-called, being an act of the Legislature of the State of Illinois, entitled "An Act to Regulate the Civil Service of Cities," approved and in force March 20, 1895, and the mayor of said city having theretofore ap-

pointed, under the provisions of said act, civil service commissioners, and said City of Chicago being then under said Civil Service Act and governed thereby); upon which examination your petitioner was "passed" as duly qualified for the office of policeman of said city, standing upon such examination 84 on list upon a scale of 100, and standing No. 96 upon the list of "eligibles."

That afterwards, to-wit, on the 14th day of March, 1898, as your petitioner is informed and believes, and upon such information and belief states the fact to be, the said Joseph Kipley, as such superintendent of police of said City of Chicago, directed the name of your petitioner to be dropped from the payroll of the policemen of said City of Chicago, and thereupon, by and under such direction, the name of your petitioner was dropped from said pay-roll; that from thence hitherto the superintendent of police of the City of Chicago, has caused the name of your petitioner to be omitted and excluded from the pay-roll of the police department of the City of Chicago; and still so causes the name of your petitioner to be omitted from said payroll. That the said conduct of the said superintendent, in so causing the name of your petitioner to be omitted and excluded from the said payroll, was and is wholly unauthorized, invalid and contrary to and in disregard of the legal rights of your petitioner.

That in consequence of the wrongful action of the said Joseph Kipley, aforesaid, in causing the omission and exclusion of your petitioner's name from the police payrolls of the City of Chicago, your

petitioner has not been paid any portion of the salary accruing and due to him as police officer as aforesaid, from, to-wit, said 14th day of March, A. D. 1898, until the present time.

That your petitioner has made demand upon the said City of Chicago, and upon the said Carter H. Harrison, mayor thereof, and upon the said Joseph Kipley, as superintendent of police of said city, while he was such superintendent, that petitioner's name should be restored to the police pay-rolls of said city, to the end that your petitioner might be enabled to draw the salary due him as police officer, alike the salary already accrued and due him and the salary accruing to him from month to month as such police officer of said City of Chicago, to which he is justly and lawfully entitled; but that the said City of Chicago, the said Carter H. Harrison, as mayor thereof, and the said Joseph H. Kipley as superintendent of police thereof, respectively refused to comply with your petitioner's reasonable and lawful demand in the premises and still do refuse so to do. That no part of the salary

7 so accruing and due to your petitioner as aforesaid from said 14th day of March, A. D. 1898, until the present time, has ever been paid to your petitioner, although your petitioner has made demand therefor upon said City of Chicago, and upon said Carter H. Harrison as mayor of said city. And in this behalf your petitioner shows that under the provisions of the laws and ordinances of the said City of Chicago the salary to which your petitioner was lawfully entitled from said 14th day

of March, A. D. 1898, until the present time was the sum of $83.33 per month, less one per cent thereof, which under the provisions of the Police Pension Act, so-called, in force during the period aforesaid, should be deducted by the police pension board or other proper authority of the said City of Chicago, from the salary of your petitioner, and paid into the police pension fund of said city.

And in this behalf your petitioner further shows that from the time of his appointment as a police officer of said city until the said 14th day of March, A. D. 1898, there had been and was deducted from the salary of your petitioner and paid into the Police Pension Fund, so-called, under the provisions of existing laws, the sum of one per cent, from each monthly payment of salary accruing to your petitioner; and that under the provisions of said law your petitioner was and is entitled to share in the benefits and advantages of said police pension fund.

And your petitioner further shows that by Section 3 of said Civil Service Act it was expressly provided and required as follows:

"Said commissioners shall classify all the offices and places of employment in said city, with reference to the examinations hereinafter provided for, except those offices and places mentioned in Section 11 of this act. The offices and places so classified by the commission shall constitute the classified civil service of said city, and no appointments to any such offices or places shall be made except
8 under and according to the rules hereinafter mentioned."

It was further provided by Section 4 of said Civil Service Act as follows:

"Said commission shall make rules to carry out the purposes of this act, and for examination, appointments and removals in accordance with its provisions, and the commission may, from time to time, make changes in the original rules."

Your petitioner further, upon information and belief, states that soon after the organization of said commission in accordance with the terms of said act, the said commissioners proceeded to classify as required, the various offices and places of employment of said City of Chicago, with reference to examinations provided for in said act, and said commission did, in fact, constitute the classified civil service of said city; that such classification was made under and by virtue of said act and the rules adopted by said civil service commission; and that by Rule 1, Section 1, of said civil service commission, in force during the entire period of the year 1898, and also theretofore in force and effect, it was provided that said commission "do hereby classify all the offices and places of employment in said city," except the excepted offices, among others, as follows: "2,504 patrolmen in the department of police at $1,000 per annum"; which classification will more fully and at large appear upon an inspection of said rules, ready to be produced.

Your petitioner further shows that by Sections 31 and 32 of said Civil Service Act, it is provided as follows: Section 31, comptroller to pay salaries only after certification. No comptroller or other auditing officer of the city, which has adopted this act, shall approve the payment of or be in any manner concerned in paying any salary or wages

to any person for services as any officer or employe of such city, unless such person is occupying an office or place of employment, according to the provisions of law, and is entitled to payment therefor.'

Section 32. Paymasters, etc., to pay salaries only after certification. No paymaster, treasurer, or other officer or agent of the city, which has adopted this act, shall willfully pay, or be in any manner concerned in paying any person any salary or wages for services as an officer or employe of such city unless such person is occupying an office or place of employment according to the provisions of law and is entitled to payment therefor."

Your petitioner further shows that the first board of civil service commissioners, in 1895, at the
9 request of the chief executive officers of the said City of Chicago and the comptroller of said city adopted the practice of passing upon and certifying all pay-rolls of the employes of said City of Chicago, including the payrolls of all police patrolmen in the employ of said city, which practice has continued from thence hitherto; and it was then and ever since has been required by the comptroller of said City of Chicago, and by said board of civil service commissioners, that all pay-rolls in the City of Chicago, including the police pay-roll, should be so certified as a condition of payment thereof.

And your petitioner states that by said certification it was in legal effect declared by said board of civil service commissioners that all persons whose names were upon said pay-rolls so certified, were entitled to be paid, as persons who are holding office under said Civil Service Act; and by the payment of said

pay-rolls so certified, by the comptroller and other officers of said city, such officers and said Chicago, in legal effect, admitted that all persons whose names were upon such pay-rolls, were occupying an office or place of employment under and according to the provisions of said Civil Service Act and entitled to payment thereunder as being in the classified civil service of said city, under said act.

And your petitioner further shows that for more than two years next prior to December 18, 1897, your petitioner was duly carried upon the police pay-rolls of said city, and from month to month was duly certified by said civil service commission, as a police patrolman entitled to pay as such, under said Civil Service Act; and that after your petitioner had taken successfully his civil service examination on December 18, 1897, and had passed the same as hereinbefore stated he continued to be certified by said civil service commission upon the police pay-rolls of said city, as a member of the classified civil service of said city, and to be paid by said city as an officer or employe of said city entitled to pay for such services under said Civil Service Act.

And your petitioner insists that the said City
10 of Chicago, said Carter H. Harrison as mayor of said city, and said Francis O'Neil as superintendent of police of said city, are, respectively, estopped by the law and the facts hereinbefore stated and set forth, to now deny that your petitioner was on the 14th day of March, 1898, and from thence hitherto has been a police patrolman in the classified civil service of the said City of Chicago, under said Civil Service Act, and was then and there entitled to

all the privileges and protection afforded by said act.

Your petitioner further states that the civil service commissioners now in office as such under said Civil Service Act, are Joseph Powell, Christian Meier and Julian W. Mack.

And your petitioner further shows that by the appropriation made by the Common Council of the City of Chicago, to-wit, in the month of December, A. D. 1897, for the payment of the employes of said city, and for other municipal purposes for the year 1898, there was an appropriation made for the partolmen then, to-wit, in December, 1897, upon the police pay-rolls of said city, and so in the classified civil service as aforesaid, including among the number of such patrolmen your petitioner. And your petitioner avers that in like manner, to-wit, in or shortly after the month of December, in the respective years 1898, 1899, 1900, 1901, and 1902, there were further appropriations made by said city for the payment of police patrolmen in the classified civil service of said city for said years respectively, and that your petitioner was entitled under said appropriations to be taken and carried upon said pay-rolls for said years 1898, 1899, 1900, 1901, 1902 and 1903, unless during said year 1903 he shall be lawfully discharged from the police force of said city, as being in the employment of said city in the classified civil service.

Wherefore your petitioner prays a writ of mandamus under the seal of said court directed to said City of Chicago, and to said Carter H. Harrison, as mayor of said City of Chicago, and to Francis O'Neil, as superintendent of police of said City of Chicago;

and to Joseph Powell, Christian Meier and
11 Julian W. Mack, as civil service commissioners
of the City of Chicago, commanding said City of Chicago, said Carter H. Harrison, as mayor of said City of Chicago, and said Francis O'Neil, as superintendent of police of said City of Chicago, as follows:

To forthwith place the name of your petitioner upon the roster of police patrolmen, and upon the police pay-roll, of said City of Chicago, to the end that your petitioner may hereafter draw the pay due your petitioner as a police patrolman of said city from time to time, as the other police patrolmen in said City of Chicago are paid.

And commanding said Joseph Powell, Christian Meier, and Julian W. Mack, as civil service commissioners of said City of Chicago, as follows: To certify the name of your petitioner as a person entitled to pay as a police patrolman of said City of Chicago, whenever such name shall hereafter appear as such police patrolman upon any pay-roll of policemen, presented to said civil service commissioners by the proper offices of said City of Chicago, for certification thereof, to the end that your petitioner may hereafter draw the pay due him as a police patrolman of said city as other police patrolmen are paid.

Your petitioner asks that such further order may be made in the premises, as justice may require, etc.

STATE OF ILLINOIS, }
COUNTY OF COOK. } ss.

Charles T. Preston, being duly sworn on oath says that he is the petitioner named in the foregoing peti-

tion, and which is subscribed by him; and that the several matters and things in said petition contained are true to the best of his knowledge, information and belief.

CHARLES T. PRESTON.

Subscribed and sworn to before me this 9th day of March, A. D. 1903.

.....,
Notary Public.

Your petitioner, Charles T. Preston, of the City of Chicago, in the County of Cook, and State of Illinois, represents and states to this court as follows:

That on, to-wit, the 13th day of February, 1863, the People of the State of Illinois, represented in the General Assembly, duly passed an act to reduce the charter of the City of Chicago, and the several acts amendatory thereof into one act, and revised the same. That by different sections of Chapter X of said act, provisions were made as follows, to-wit:

"Section 1. There is hereby established an executive department of the municipal government of said city to be known as the board of police. Said board shall consist of three commissioners, in addition to the mayor, who shall be *ex officio* a member thereof, to be chosen in the manner hereinbefore prescribed; and a majority of said board shall constitute a quorum for the transaction of business. * * *

"Section 4. Said board shall assume and exercise the entire control of the police force of said city, and shall possess full power and authority over the police organization, government, appointments, and discipline within said city. * * *

"Section 6. The duties of the police force shall be
execu[ted] under the direction and control of said
board, and according to rules and regulations which
it is h[ereby] authorized to pass from time to time, for
the n[more] proper government and discipline of its
subor[dinate] officers and the police force of the city.
The s[said] police force shall consist of a superintendent
of po[lice], three captains of police, six sergeants, nine-
ty police patrolmen, and as many more police
19 [patrolmen] as may be authorized by the common
c[council] on application by this board. *The several offices hereby created* shall be severally filled by appointments in the mode prescribed by this act. And each person so appointed shall hold office only during such time as he shall faithfully observe and execute all the rules and regulations of said board, the laws of the state, and the ordinances of the city.
* * *

"Section 7. The qualification, enumeration and distribution of duties, mode of trial and removal from office, of each officer of said police force, shall be particularly defined and prescribed by rules and regulations of the board of police; provided, however, that no person shall be appointed to or hold office of superintendent of police without the advice and consent of the common council to every such appointment; nor shall any person be appointed to or hold office in the police force, aforesaid, who is not a citizen of the United States, or who shall not have resided within the State of Illinois two years next preceding his appointment, or who shall ever have been convicted of crime: And, provided, that no person shall be removed therefrom except upon *written charges* preferred against him to the board of police, and after an opportunity shall have been afforded him of being heard in his defense; but the board of police shall have power to suspend any member of the police department of the city pending the hearing of the charges preferred against him: And, provided, that when any vacancy shall occur in

the force of captain of police, the same shall be filled by appointment from among the persons then in office, as sergeants of police, and a like vacancy in the office of sergeant of police shall be filled by appointment from among the persons then in office as police patrolmen."

Said police force so continued until the aforesaid act was amended by the Legislature of the State of Illinois, February 16, 1865, when the foregoing sections, six and seven, were repealed, and Sections 15, 16 and 19 of the Act of 1865, were passed. The said sections read as follows:

"Section 15. The duties of the police force shall be executed under the direction and control of said board, and according to rules and regulations which it is hereby authorized to pass, from time to time, for the more proper government and discipline of its suboridinate officers and the police force of said city. The said force shall consist of a general superintendent of police, one deputy superintendent of police, three captains of police, sergeants of police not exceeding twelve, and as many more police patrolmen, not exceeding two hundred, as may be authorized by the common council, on the application of the board of police commissioners, and each patrolman so appointed, shall hold his office only during such time as he shall faithfully observe and execute all the rules and regulations of said board, the laws of the state, and the ordinances of the city: Provided, that for incompetency, neglect of duty or other sufficient cause, the said board may at any time, remove the superintendent and deputy superintendent of police or the fire marshal and assistant fire marshal.

"Section 16. The qualification, enumeration and distribution of duties, mode of trial and removal from office of each officer of said police force, shall be particularly defined and prescribed by rules and regulations of the board of police; nor shall

any person be appointed to or hold office in the police force aforesaid, who is not a citizen of the United States, or who shall not have resided within the State of Illinois two years next preceding his appointment, or who shall ever have been convicted of crime: And, provided, that no person shall be removed therefrom, except upon *written charges* preferred against him to the board of police, and after an *opportunity shall have been afforded him of being heard in his defense;* but the board of police shall have power to suspend any member of the police department of the city, pending the hearing of the charges preferred against him. And, provided, that whenever any vacancy shall occur in the office of captain of police, the same shall be filled by an appointment from among the persons then in office as sergeants of police; and a like vacancy in the office of sergeant of police shall be filled by appointment from among persons then in office as police patrolmen.

"Section 19. From and after the passage of this act the mayor of said city shall cease to be in any manner a member of the board of police and of the board of public works of said city."

The said police force continued under the control of the police board aforesaid, until, to-wit, the adoption by the Legislature of the State of Illinois, of the General Act to provide for the incorporation of cities and villages, approved April 10, 1872, and which act was adopted by the City of Chicago, April 23, 1875.

That by said act it was amongst other things provided as follows, to-wit:

"Section 6. All courts in this state shall take judicial notice of the existence of all villages and cities organized under this act, and of the changes of the organization under this act; and from the time of such organization or change of organization the

prisions of this act shall be applicable to such cits and villages, and all laws in conflict therewith sh no longer be applicable. But all laws or parts of ws, not inconsistent with the provisions of this actshall continue in force and applicable to any suc city or village, the same as if such change of orgnization had not taken place."

hat by Section 1 of Article V of said act it was, amgst other things, provided as follows:

' * * * The city council in cities and the prident and board of trustees in villages shall have theollowing powers: * * *

'Sixty-six. To regulate the police of the city or villge, and pass and enforce all necessary police ordnances. * * *

'Sixty-eight. To prescribe the duties and powers of superintendent of police, policeman and watchman"

That afterwards, to-wit, on the 28th day of June, 1875, the city council of the City of Chicago duly passed an ordinance approved by the mayr, for the reorganization of the police departmer of the city. The ordinance contained seventeer sections, and those deemed material, in this caue, are as follows:

'Be it ordained by the city council of the City of Chiago:

"Section 1. There is hereby established and creed a department of the municipal government of sid city, to be known as the departnent of the polie. * * *

"Section 2. There is hereby created the office of city marshal of said city. The term of said office shal be for the term of two years commencing with

July 1st, 1875, and the salary attached to said office shall be $4,000 per annum. The city marshal shall be appointed by the head of the police department, and shall give a bond with security to be approved by the mayor, in the sum of $25,000, conditioned for the faithful performance of the duties of the office, and shall well and truly account for and pay over all moneys, and surrender any and all property, books, and papers which may come into his hands as said city marshal, on the expiration or sooner termination of his term of office. He shall, as such head of the police department (subject to all the general ordinances of the city), *assume and exercise the control of the police force of the city*, and shall possess full power and authority, subject to all general ordinances of the city council, *over the police organization, government, appointments*, and discipline within said city, and shall have the custody and control, subject to the direction of the comptroller, of the public property, books, records and equipments belonging to the police department. * * *

"Section 5. The said force shall consist of one general superintendent of police, one deputy superintendent of police, four captains of police, twenty sergeants, and the police patrolmen now in the employ of the city, which may be increased or decreased in number from time to time, or any police patrolman may at any time be removed and discharged from the police force by the superintendent of the force, with the concurrence of the city marshal. The deputy superintendent and sergeants may be removed and discharged or reduced in rank by the city marshal, with the written concurrence of the mayor of the city; provided, however, that the office of deputy superintendent shall be discontinued and cease to exist after the present fiscal year. All the members of the police force shall take an oath to faithfully discharge their duties. * * *

"Section 17. The police force as heretofore existing, shall continue to be the police force until otherwise changed by this ordinance, but the board of police, and the office theretofore known as that of the commissioner of the board of police of the City of Chicago, shall cease to exist, and no duties shall hereafter be performed or power or authority exercised in connection with said police force by said board or any commissioner of the board of police of said city, after the passage of this ordinance."

That afterwards, to-wit, on the 13th day of
22 April, 1881, the city council of the City of Chicago duly passed an ordinance of said city, which ordinance was approved on the 18th day of April, 1881. Said ordinance appears in the municipal code of Chicago, published by authority of the city council in the year 1881, Chapter VIII. Said ordinance, among other things, provided as follows, to-wit:

"730. There is hereby established an executive department of the municipal government of the City of Chicago, which shall be known as the department of police, and shall embrace the superintendent of police, a secretary to said superintendent, one captain of police for each district, and such number of lieutenants, detectives, sergeants, and police patrolmen as has been or may be prescribed by ordinance.

"731. There is hereby created the office of superintendent of police, who shall be the head of said department of police, and shall hold his office for the term of two years, and until his successor shall be appointed and qualified. * * *

"734. The superintendent shall have the management and control of all matters relating to the department, its officers and members; *and, with the consent of the mayor, he shall appoint all officers and*

members of said department; provided, that all captains shall be appointed from members of the police serving as lieutenants, all lieutenants from members serving as sergeants, and all sergeants from members serving as patrolmen.

"735. Said superintendent shall have the power to remove from the police force any police patrolman at his pleasure, and, with the concurrence of the mayor, he may remove, or reduce in rank any officer or member of said department. * * *

"750. The superintendent shall hear and determine all cases for the violation of any rule, regulation or order of said department, or other breach of discipline, and shall have power to punish the offending party by reprimand, forfeiture, and withholding pay for a specified time, or dismissal from the force; but no more than ten days' pay shall be forfeited and withheld for any offense.

"751. The superintendent of police may prefer written charges, without oath, for any violation of the police rules, regulations or orders, against any police officer or patrolman upon the regular police force, upon his own knowledge, or upon written information communicated to him by any member of the police department.

"752. During the pending of charges against any police officer or patrolman upon the police force, the superintendent may suspend from duty any such officer or patrolman until such charges can be examined."

Your petitioner states that he is advised, and
23 avers the facts to be, that said Sections 735 and 750 were upon the passage of said ordinance, void; and were and are of no force or effect, for the reason that the provisions thereof are directly at variance with the provisions of the statute of

the State of Illinois, pertaining to the removal of police patrolmen from the police force of said City of Chicago.

That the aforesaid provisions of said ordinance, so far as the same were valid, continued in force until the adoption by the legal voters of said City of Chicago, as hereinafter stated, of an act of the legislature of the State of Illinois, entitled, "An Act to Regulate the Civil Service of Cities," on, to-wit, the 25th day of March, 1895, and until, to-wit, the first day of July, 1895, when the then mayor of said City of Chicago, by his proclamation, declared the said act to be thereafter in full force and effect in said City of Chicago, as hereinafter stated.

Your petitioner further shows that at the municipal election in said City of Chicago, held in the month of April, 1887, John A. Roach was elected mayor of said City of Chicago, and having duly qualified, entered upon the duties of such office and became in law and in fact the mayor of said City of Chicago, and so continued to be such mayor, and acted as such for, to-wit, two years thereafter. That on, to-wit, the .... day of ....., 188.., one ..... was duly appointed by the then mayor of said City of Chicago, by and with the advice and consent of the city council of said City of Chicago, to the office of superintendent of police of said City of Chicago; and having duly qualified as such superintendent of police was, on the 1st day of June, 1886, performing the duties of such office of superintendent of police in said City of Chicago. That on said 1st day of June, 1886, the city council of said City of Chicago, had, by an ordi-

nance theretofore duly passed, and then in force, authorized the appointment of a large number of police patrolmen, to-wit, eleven hundred and eighty-one, for service on the police force in the police
24 department of said City of Chicago. Your petitioner further shows that on, to-wit, the 1st day of June, 1886, your petitioner was a citizen of the United States of America, thirty-nine years of age, and for more than two years next previous to said 1st day of June, 1886, had been a resident of said City of Chicago, and had never been a defaulter to said municipal corporation, said City of Chicago; and was then and there in all respects qualified and eligible for appointment to the office of police patrolman in said city.

That thereafter, on, to-wit, the 1st day of June, 1886, there was a vacancy in the number of police patrolmen authorized by the city council as aforesaid, and thereupon your petitioner was duly appointed to the office of police patrolman in the department of police in said City of Chicago by ...., the then superintendent of police of said City of Chicago, which appointment your petitioner then and there accepted, and took and subscribed the following oath of office, to-wit:

STATE OF ILLINOIS, }
COUNTY OF COOK. } ss.

I, Charles T. Preston, having been duly appointed to the office of police patrolman, do solemnly swear that I will support the Constitution of the State of Illinois, and that I will faithfully discharge

the duties of such police patrolman according to the best of my ability. CHARLES T. PRESTON.

Subscribed and sworn to before me this 1st day of June, 1886.

....., *Notary Public.*

(Seal)

And thereupon, immediately after taking such oath of office, he entered upon the performance of his duties as such police patrolman, and continued thereafter in the discharge thereof until his further performance of such duties was wrongfully and unlawfully interrupted, as hereinafter stated and set forth.

And your petitioner avers that the office of police patrolman to which petitioner was appointed as aforesaid, was an office created by the said act of the legislature, passed February 13, 1863, and first above referred to, and by the amendments thereto passed by said legislature February 16, 1865, and secondly above referred to; which said two acts, so far as the provisions thereof created the office of police patrolman in and for said City of Chicago, continued in full force and effect as valid and existing laws of said state, at the time of your petitioner's appointment to said office as aforesaid; and that, in so far as said acts of said legislature created the office of police patrolman, they have never been repealed, but are still in full force and effect. And your petitioner avers that he in accepting said appointment to such office of police patrolman, and rendering service as aforesaid, relied upon said

Acts of 1863 and 1865 as having created said office of police patrolman; and petitioner now insists that said office, to which he was appointed, was in fact created by said acts; and that said acts are a full justification for the claim of your petitioner which he now makes, to-wit, that upon said appointment and taking of the oath of office as aforesaid, he then and there held the office of police patrolman, which had been created under said statutes of 1863 and 1865, and that he could only be removed from said office by proceedings in conformity with the provisions of said acts or amendments thereto; and that no such removal was ever attempted, as is hereinafter shown.

That your petitioner then and there became a police patrolman of said City of Chicago, and in the service of said city as such. That during all of the period of time between the 1st day of June, 1886, and said 14th day of March, 1898, your petitioner was

26 not only a police patrolman of said City of Chicago, duly appointed on the 1st day of June, 1886, by the then superintendent of police of said City of Chicago, with the consent of the then mayor of said City of Chicago, and continued in office as aforesaid, but he was, during all said period, recognized as being such police patrolman by the respective mayors of said City of Chicago, and the respective superintendents of police of said City of Chicago, and by the city council of said City of Chicago; and that no successor to your petitioner as such police patrolman was at any time during said period appointed; and said City of Chicago, during all of said period of years, duly appropriated the money

to pay the salary accruing to your petitioner as such police patrolman; and such salary was paid to your petitioner as such police patrolman, from time to time, to-wit, from the Month of June, 1886, to said 14th day of March, 1898.

Your petitioner further shows that an act duly passed by the Legislature of the State of Illinois, entitled, "An Act to Regulate the Civil Service of Cities," approved and in force March 20th, 1895, was pursuant to the provisions of law, submitted to the legal voters of the City of Chicago, for their adoption, at a general election held in said City of Chicago, on, to-wit, April 2nd, 1895. That at said election said act was adopted by the legal voters of said city; and thereupon, to-wit, on July 1st, 1895, George B. Swift, the then mayor of said City of Chicago, issued his proclamation in words and figures as follows, to-wit: "Whereas, under the provisions of an Act of the General Assembly of the State of Illinois, entitled 'An Act to regulate the Civil service of Cities' approved and in 'force, March 20th, 1895,' there was duly submitted to a vote of electors of the City of Chicago, at a general city election, held April 2nd, 1895, the proposition whether the city and its electors should adopt and become en-
27 titled to the benefits of said act; and, whereas, a large majority of the votes cast at such election were cast for such proposition and in favor of the adoption of said act; now, therefore, as required by said Act, I, George B. Swift, mayor of the City of Chicago, hereby declare that said act is in full force and effect in the City of Chicago from and after this date, and that in accordance with the pro-

visions thereof, I have this day appointed as the three civil service commissioners under said act, John M. Clark, for the term of three years; Robert A. Waller, for the term of two years; and Christopher Hotz, for the term of one year.

"Dated July 1st, 1895.

GEORGE B. SWIFT,
Mayor."

Your petitioner further shows that upon the adoption by the said City of Chicago of the said Civil Service Act, so-called, and its becoming operative in said city pursuant to law and under said proclamation of the mayor, dated July 1st, 1895, all laws, or parts of laws, and all ordinances and regulations of said City of Chicago, inconsistent with said act, were thereupon and thereby repealed by virtue of Section 37 of said Civil Service Act, so-called.

Your petitioner further shows that by Section 3 of said Civil Service Act, it is expressly provided and required as follows:

> "Said commissioners shall classify all the offices and places of employment in said city, with reference to the examination hereinafter provided for, except those offices and places mentioned in Section 11 of said act. The offices and places so classified by the commission shall constitute the classified service of such city; and no appointment to any such office or place of employment shall be made except under and according to the rules hereinafter mentioned."

It is further provided by Section 4 of the Civil Service Act, as follows:

> "Said commission shall make rules to carry out the purposes of this act, and for examina-

tions, appointments and removals in accordance with its provisions, and the commission may, from time to time, make changes in the original rules."

And your petitioner further shows that by Rule 1 of said rules adopted by said civil service commissioners, it was among other things provided, as follows:

RULE 1.

CLASSIFICATION.

"1. Unclassified Service.—Section 11 of said act provides that the following offices and places of employment shall not be included in the classified service. Officers who are elected by the people, or who are elected by the city council pursuant to the city charter, or whose appointment is subject to confirmation by the city council, judges and clerks of election, members of the board of education, the superintendent of schools, heads of any principal department of the city, members of the law department and one secretary of the mayor.

"The offices and places above named shall constitute the unclassified service.

"2. Classified Service.—All other offices and places of employment in said city under the provisions of said act, whether permanent, temporary or substitute, shall constitute the classified service. With reference to the examinations hereinafter provided for, they are hereby classified under two general classes, to be known as Class A and Class B, respectively. This classification is based mainly upon nature of employment. The positions embraced in Class A will be chiefly those of a permanent character, while those in Class B will be more in the nature of temporary employment. The commission will decide as occasion may require, in which class and division any particular office or place of employment shall belong.

"3. Official and Labor Service.—Class A shall be known as the official service, and Class B shall be known as the labor service.

"4. Divisions and Grades.—For convenience in designation, in carrying on examinations, certifying for appointments and promotions, and in making removals, the official service shall be divided into divisions based upon the character of the service to be performed, and each division shall be divided into grades, based upon amount of compensation. The several divisions of the official service shall be as follows: * * *

"Division D.—Police Service.—All persons in the uniformed police force."

Your petitioner further, on information and belief, states that soon after the organization of said civil service commission, in accordance with the terms of said act, the commissioners proceeded to 29 classify, as required by said act, the various offices and places of employment of said City of Chicago; that such classification was made under and by virtue of said act, and the rules adopted by said Civil Service Commission. Your petitioner further avers that all policemen in said City of Chicago, including your petitioner, were, at the time of the adoption of said Rule 1, and at the time of said classification in the uniformed police force of said city, and by virtue of said act and rule of said commission and the classification thereunder, became and were classified in Division D of the said official service of said City of Chicago, under said Civil Service Act, and thereupon the offices and places of employment so classified by said Commission did "constitute the classified service of said City of Chicago." And your petitioner further shows that by said provi-

sion, the classification of the offices of police patrolmen of said City of Chicago, then and there held by them, the then incumbents of said offices, including your petitioner, then and there became police patrolmen, *de jure,* in the classified service of said City of Chicago, and your petitioner so continued from thence hitherto. And your petitioner further shows that by Sections 31 and 32 of said Civil Service Act, it is provided as follows:

"Section 31. No comptroller or other auditing officer of a city which has adopted this act shall approve the payment of, or be in any manner concerned in paying any person any salary or wages for services as an officer or employe of such city, unless such person is occupying an office or place of employment according to the provisions of law, and is entitled to payment therefor.

"Section 32. No paymaster, or other officer or agent of a city which has adopted this act, shall wilfully pay, or be in any manner concerned in paying any person any salary or wages for service as an officer or employe of such city, unless such person is occupying an office or place of employment according to the provisions of law and is entitled to payment therefor."

And your petitioner further shows that the first board of Civil Service Commissioners appointed by the mayor of said City of Chicago, George B. Swift, July 1, 1895, in compliance with said Sections 31 and 32 of said Civil Service Act, passed upon and certified all the pay-rolls of the employes and officers of said City of Chicago, including the pay-rolls of all police patrolmen in the employ of the said City of Chicago; and it was then and ever since has been required by the comptroller of said City

of Chicago, and by the board of Civil Service Commissioners of said City of Chicago, as well as by Sections 31 and 32 of said Civil Service Act, that all pay-rolls in said City of Chicago, under said Civil Service Act, including the pay-rolls of police patrolmen of said City of Chicago, should be so certified as a condition of payment thereof. And your petitioner states that by said certification it was in legal effect declared by said board of Civil Service Commissioners, that every person whose name was on the pay-roll so certified was "entitled to be paid as a person occupying an office or place of employment" under and according to the provisions of said Civil Service Act, and "entitled to payment therefor as being in the Classified Civil Service of said City of Chicago, under said act.

And your petitioner further shows that at the time of the classification of the Civil Service of said City of Chicago, including all the positions in the uniformed police force of said city, in said department of police, provided by statute and ordinances of said city, and which classification was published and distributed by said Civil Service Commissioners to the public, such publication being made August 14, 1895, and which went into effect on Monday, August 18, 1895, your petitioner was a police patrolman and included in the uniformed police force of said City of Chicago, having been duly appointed by the superintendent of police of said City of Chicago, with the consent of the mayor of said City of Chicago, as aforesaid, and thereafter having taken the oath of office and qualified and acted as such police patrolman as aforesaid; and that he thereupon became by

virtue of his office as police patrolman in the police force then and there held by him, a member of the Classified Civil Service of said City of Chicago,
31 as an office *de jure*, and thereafter so continued, to-wit, from thence hitherto; and that he has never been legally discharged or separated from the office of police patrolman in the Classified Civil Service of said city, or deprived of his office, as said police patrolman, by due process of law.

And your petitioner further shows that for more than two years next prior to the 14th day of March, 1898, your petitioner was a police patrolman of said City of Chicago, and continuously performed the duties of such police patrolman, and was duly carried upon the pay-rolls of said City of Chicago, and from month to month was duly certified by said Civil Service Commissioners as a police patrolman entitled to pay as such under said Civil Service Act.

That at the municipal election held at the City of Chicago in April, 1897, Carter H. Harrison was duly elected mayor of said City of Chicago, and having duly qualified and entered upon the duties of such office, he became in law and in fact the mayor of said City of Chicago, and by re-election from term to term thereafter continued to be the mayor of said city until, to-wit, the month of April, 1905, when he was succeeded in the office of mayor of said City of Chicago by Edward F. Dunne, who was duly elected mayor of said city, and served as such from April, 1905, to the month of April, 1907, when he was succeeded in said office of mayor of the City of Chicago by Fred A. Busse, who is now the duly elected, qualified and acting mayor of said city.

That on, to-wit, the first Monday of May, 1897, Joseph Kipley was duly appointed by the then mayor of said City of Chicago, said Carter H. Harrison, as superintendent of police of said City of Chicago, by and with the consent of the city council of said city; and said Joseph Kipley, having duly qualified as such superintendent, entered upon the discharge of the duties of such office, and then and there became and was, by due appointment and re-
appointment, the superintendent of police from
32 the first Monday in May, 1897, until after the month of January, 1900.

That, to-wit, on the 14th of March, 1898, as your petitioner is informed and believes, and upon such information and belief states the fact to be, the said Joseph Kipley, as such superintendent of police of said city, illegally and without warrant of law, directed the name of your petitioner to be dropped from the pay-roll of police patrolmen of said city, and thereupon by and under such direction the name of your petitioner was dropped from said pay-roll; *that such action was taken without any charges having ever been preferred against your petitioner, and without any trial of any charges of any nature against him, nor was such action* because of any alleged misconduct on his part; and said action was taken *without the written concurrence of the then mayor of said City of Chicago.* That from thence the said Joseph Kipley, claiming to act in that behalf as superintendent of police of said city, during his term of office, caused the name of your petitioner to be omitted and excluded from

the pay-roll of the police department of the said city; and each and every one who has been duly and legally appointed to the office of superintendent of police of said city, from the month of January, 1900, up to and including the present time, has still caused, and so causes, the name of your petitioner to be excluded and omitted from said pay-roll. That said conduct of said Joseph Kipley, and those following him in office, as superintendent of police of said city, in so omitting and excluding the name of your petitioner from said pay-roll, was and is a wrongful denying to your petitioner of his legal rights, as a police patrolman of said city, to the emoluments of his said office, and was without due process of law.

That in consequence of the wrongful action of the said Joseph Kipley, and those who have followed him in office, as superintendent of police of said city, up to and including the present time, in causing the omission of your petitioner's name
33 from the pay-rolls of police patrolmen of said city, your petitioner has not been paid any portion of the salary accruing and due to him as a police patrolman as aforesaid from, to-wit, said 14th day of March, 1908, until the present time. And your petitioner has made demand upon the said City of Chicago, and upon said Carter H. Harrison, mayor of said City of Chicago, and upon Joseph Kipley, as superintendent of police of said City of Chicago, which demand was made during their said incumbency of their respective offices, that his name should be placed on, or restored to,

the payroll of police patrolmen of said City of Chicago, to the end that your petitioner might be enabled to draw the salary due him as a police patrolman, alike the salary already accrued to him, and the salary accruing to him from month to month as such police patrolman of said City of Chicago, to which he is justly and lawfully entitled; but the said City of Chicago, the said Carter H. Harrison, as mayor thereof, and the said Joseph Kipley, as superintendent of police thereof, and those who have followed him in said office as superintendent of police of the said City of Chicago, whom your petitioner makes defendants herein, have respectively refused to comply with your petitioner's reasonable and lawful demand in the premises, and still do refuse so to do. That no part of the salary so accrued and accruing and due your petitioner as aforesaid from said 14th day of March, 1898, until the present time, has ever been paid to your petitioner, *although your petitioner has made a demand therefor.*

Your petitioner further shows that under the provisions of the law of the state and the ordinances of said City of Chicago, the salary to which your petitioner was lawfully entitled from said 14th day of March, 1898, until the present time, was the sum of $83.33 per month, less 1 per cent thereof, which, under the provisions of the Police Pension Act, so-called, as a part of the statute law of the State of Illinois, in force during the period aforesaid,

34 should be deducted by the Police Pension Board or other proper authority of said City of Chicago, from the salary of your petitioner and paid

into the Police Pension Fund of said city. And in this behalf your petitioner further shows that from the time of his appointment as a police patrolman of said city, on, to-wit, the 1st day of June, 1886, up to and including the 14th day of March, 1898, there was, from time to time, deducted from the salary of your petitioner and paid into the Police Pension Fund, so-called, under the provisions of the then existing Police Pension Laws of the State of Illinois, the sum of 1 per cent from each and every monthly payment of salary accruing to your petitioner; and that under the provisions of said pension law; to which for greater certainty, and a fuller statement of the legal right thereby secured to your petitioner to share in said fund (to which he had therefore been required to, and therefore did, contribute as aforesaid), your petitioner prays to refer with the same effect as if said act, being then and still one of the public laws of the State of Illinois, were herein fully set forth and quoted.

And your petitioner says that the act of the said Joseph Kipley, as superintendent of police of said City of Chicago, in directing the name of your petitioner to be dropped from the pay-roll of police patrolmen of the said City of Chicago, as aforesaid, and in causing the name of your petitioner then and thereafter to be omitted and excluded from the pay-roll of the police department of said city, resulted in the denying to your petitioner his legal right to share in the benefits of said fund, and was and is wholly unauthorized and without due process of law. And your petitioner further shows that such

action of said Joseph Kipley, was and is contrary to Article 2 of the Constitution of the State of Illinois, which reads as follows, to-wit: "No person shall be deprived of life, liberty, or property, without due process of law." Such action was and is, also, contrary to Section 1 of Article XIV of
35 the Amendments to the Constitution of the United States of America, which reads as follows, to-wit: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without *due process of law, nor deny to any person within its jurisdiction the equal protection of the law.*"

And your petitioner further avers that the said defendants insist that the action of the said Joseph Kipley, superintendent of the police force of the City of Chicago, and of the said other defendants, in continuing to omit and exclude the name of your petitioner from the pay-roll of said city, and in omitting and excluding the name of your petitioner from the pay-roll of the police department of the said city, had and has the effect to deprive your petitioner of his opportunity and right to exercise the functions and duties of a police patrolman as a member of the Classified Civil Service of said City of Chicago, and to receive and enjoy the salary pertaining to the office of police patrolman of said City

of Chicago, so held by him; which claim of said defendants, and their conduct in the premises, was and is a wrongful denying to your petitioner of his legal rights and without due process of law; and defendants thereby deny to your petitioner the equal protection of the law. And your petitioner insists that the said City of Chicago, the mayor of said City of Chicago, and the superintendent of police of said City of Chicago, are respectively estopped by law and by the facts hereinbefore stated and set forth, to now deny that your petitioner was, on the said 14th day of March, 1898, and from thence hitherto has been, and still is, a police patrolman in the Classified Civil Service of said City of Chicago, under said Civil Service Act, *and that as such he was, and is, as such police patrolman, entitled to all the benefits and protection afforded by said Civil Service Act, and particularly to the* 36 *benefits and protection of the provisions of said act governing the removal or discharge from said service of police patrolmen of said City of Chicago, in the classified service thereof.*

Your petitioner further states that before the filing of his said petition herein, the said Joseph Kipley was succeeded in the said office of superintendent of police of said City of Chicago by Francis O'Neil, who was duly appointed superintendent of police of said City of Chicago by said Carter H. Harrison, the then mayor of said City of Chicago, by and with the advice and consent of the city council of said City of Chicago; and that after the filing of your petitioner's petition herein, the said Francis O'Neil was succeeded in the office of superintend-

ent of police of said City of Chicago by John M. Collins, who was duly appointed such superintendent of police of said City of Chicago, by said Edward F. Dunne, who was, at the time of such appointment, the duly elected, qualified and acting mayor of said City of Chicago, by and with the advice and consent of the city council of said City of Chicago. That the said Edward F. Dunne was succeeded in the office of mayor of said City of Chicago by said Fred A. Busse. That the said Fred A. Busse was duly elected to the office of mayor of said City of Chicago, duly qualified, and is now the legal and acting mayor of said City of Chicago. That the said John M. Collins was succeeded in the office of superintendent of police of said City of Chicago by George M. Shippy, who was duly appointed to the office of superintendent of police of said City of Chicago by the said Fred A. Busse, the then duly elected, qualified and acting mayor of said City of Chicago, by and with the advice and consent of the city council by said City of Chicago, and is now the duly appointed and acting superintendent of police of said City of Chicago. And that since the filing of your petitioner's petition the personnel of said Civil Service Commissioners of said City of Chicago has been changed, and said Civil Service Commission now consists of Elton Lower, M. L. McKinley and H. D. Fargo.

Your petitioner further shows that the annual appropriation made by the city council of said City of Chicago, for the year 1886, and for each and every year thereafter, up to and including the year 1895,

for the payment of police officers and employes of said City of Chicago, and for other municipal purposes for each of the then respectively ensuing years, included appropriations for the payment of police patrolmen of said City of Chicago, among whom your petitioner was included as a member of said police force of said City of Chicago. And the further appropriations made by said city council of said City of Chicago, for the payment of the police patrolmen of said city, for each and every year thereafter, up to and including the year 1898, during which time your petitioner was a police patrolman in the uniformed police force of said City of Chicago, in the Classified Civil Service, and drew his pay from month to month as such police patrolman of said city for each and every month from July 1st, 1895, up to and including the month of March, 1898, and his monthly voucher, for each and every month thereof, was duly certified by said Civil Service Commissioners of said City of Chicago, as said petitioner's pay therefor became due him. And your petitioner further avers that in like manner, in the year 1899, and for each and every year thereafter, up to and including the present time, there was annual appropriation made by said city council of said City of Chicago, for the payment of police patrolmen in the uniformed police force of said City of Chicago, in the Classified Civil Service thereof, for each and every ensuing year, respectively; and that your petitioner was and is, entitled under said appropriations to be taken and carried upon said pay-rolls for each and every month of said several years, up to and including the present time, as having been lawfully

in the service of said City of Chicago, in the Classified Civil Service thereof, as a police patrolman
38 in said police department of said City of Chicago.

Wherefore your petitioner prays a writ of mandamus under the seal of said court, directed to the said City of Chicago and said Fred A. Busse, as mayor of said City of Chicago, and to George M. Shippy, as superintendent of police of said City of Chicago, and to Elton Lower, W. L. McKinley, and H. D. Fargo, as Civil Service Commissioners of said City of Chicago, and the successors in office of said respective officials, commanding them respectively, as follows: Commanding said City of Chicago, and said respective officials, other than the Civil Service Commissioners, to forthwith place the name of your petitioner upon the roster of police patrolmen, and upon the pay-rolls of police patrolmen, of said City of Chicago, to the end that your petitioner may hereafter draw the pay due your petitioner as police patrolman of said City of Chicago, from time to time, as other police patrolmen are paid.

And commanding said Civil Service Commissioners of said City of Chicago, to certify the name of your petitioner as a person entitled to pay as a police patrolman of said City of Chicago, whenever your petitioner's name shall hereafter appear as such police patrolman upon any pay-roll of police patrolmen presented to the Civil Service Commissioners for their certification; and to the end that your petitioner may hereafter draw the salary due him as a police patrolman of said City of Chicago, as other police patrolmen are paid.

And your petitioner further asks that such further order be made in the premises as justice may require.

CHARLES T. PRESTON,
Petitioner.

And afterwards, to-wit, on the 5th day of 39-43 December, A. D. 1908, the following proceedings were had and entered of record in said court, to-wit:

228,725

Charles T. Preston,

vs.

City of Chicago and Carter H. Harrison, Francis O'Neill, Superintendent of Police; Joseph Powell, Christian Meier, and Julian W. Mack, as Civil Service Commissioners of the City of Chicago.

MANDAMUS.

On motion of respondents' attorney, it is ordered that the respondents' demurrer, now on file, stand as demurrer to the petitioner's petition as amended and said cause coming on to be heard upon the demurrer to said petition as amended herein, after arguments of counsel and due deliberation by the court said demurrer is sustained and thereupon the petitioner elects to stand by his said amended petition and it is ordered by the court that said cause be and is hereby dismissed at petitioner's costs.

Therefore it is ordered by the court that the petitioner take nothing by his said suit and the defendants go hence without day and do have and recover of and from the petitioner their costs and charges in this behalf expended and have execution therefor.

SPECIFICATION OF ERRORS RELIED UPON.

First: The allegations of petitioner's petition, and amended and supplemental petition, filed in the Superior Court of Cook County, in the State of Illinois, the truth of which allegations was, by the demurrer to said amended and supplemental petition, admitted, show that the petitioner was, by the action of said defendants in error set forth in said amended and supplemental petition, and in the judgment of said Superior Court and the affirmance thereof by the final judgment of said Supreme Court of Illinois, wrongfully and without due process of law, deprived of his right to have his name carried upon the payroll as a police patrolman in the uniformed police force in the department of police of said City of Chicago, and to draw his pay as a police patrolman in said police force, in the department of police in said City of Chicago, as other police patrolmen on said police force, in the department of police, in said City of Chicago, are paid; in this, that the petitioner was, without due notice of charges preferred against him as a police patrolman in the uniformed police force of the City of Chicago, excluded from the exercise of his duties as such police patrolman and deprived of his right to be paid; and that the said action and the approval thereof by said Superior Court of

Cook County, and the affirmance thereof by the final judgment of said Supreme Court of Illinois, was and is a deprivation of petitioner's legal rights, and was and is in violation of Section 2 of Article 2 of the Constitution of the State of Illinois, and also in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States of America.

Second: The Supreme Court of the State of Illinois, by its judgment of affirmance herein of the judgment of the Superior Court of Cook County, Illinois, failed and refused to recognize or give effect to the provisions of Section 2 of Article 2 of the Constitution of the State of Illinois; and also failed and refused to recognize and enforce the rights of petitioner herein, by *affording him an opportunity to be heard in his defense;*—a right secured to him under the provisions of Section 1 of Article XIV of the Amendments to the Constitution of the United States.

Third: The Supreme Court of the State of Illinois, by its judgment in said cause affirming the judgment of said Superior Court of Cook County, Illinois, determined and held that the facts, stated in petitioner's said amended and supplemental petition, gave the petitioner therein no right to relief as therein and thereby prayed; which action of said Supreme Court of Illinois was, in legal effect, *a deprivation of petitioner's right to the equal protection of the law,* in violation of petitioner's right secured to him by the provisions of Section 1 of Article XIV of the Amendments to the Constitution of the United States.

Fourth: The Supreme Court of the State of Illinois, by its judgment in said cause affirming the judgment of said Superior Court of Cook County, Illinois, determined and held that the facts, stated in petitioner's said petition, and amended and supplemental petition, gave the petitioner therein no right to relief as therein and thereby prayed; which action of said Supreme Court of Illinois was, in legal effect, a deprivation of petitioner's property rights, in violation of Section 2 of Article 2 of the Constitution of the State of Illinois, and in violation of petitioner's property rights secured to him by the provisions of Section 1 of Article XIV of the Amendments to the Constitution of the United States.

Fifth: The Superior Court of Cook County, Illinois, erred in sustaining the demurrer of the defendants in error to the amended and supplemental petition filed by petitioner in said Superior Court of Cook County, Illinois, on June 5, 1908, and in dismissing the petition, of the petitioner, plaintiff in error herein, at the costs of plaintiff in error herein, and in entering judgment in said cause against this petitioner, plaintiff in error herein; which resulted in abridging the privileges or immunities of a citizen of the United States, as well as of a citizen of the State of Illinois, and was and is in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States; and the Supreme Court of Illinois erred in its judgment affirming said judgment of said Superior Court.

Sixth: The Superior Court of Cook County, Illinois, erred in entering judgment in said cause of November 5, 1908, dismissing the petition of your

petitioner, plaintiff in error in said suit, and the amendments to said petition, at the costs of this plaintiff in error, and in entering judgment in said cause against petitioner, plaintiff in error therein, for costs; and the Supreme Court of the State of Illinois erred in its judgment affirming said judgment of said Superior Court.

BRIEF OF THE ARGUMENT.

I.

When federal questions are pleaded, all that is essential is that the federal questions must be presented in the state court in such a manner as to bring them to the attention of that tribunal. (Transcript of Rec., pp. 19, 33; of Rec., pp. 32, 66, 67.)

Missouri, Kansas & Texas Railway Company, Plaintiff in Error, v. *John Elliott,* 184 U. S., 530; 22 Sup. Ct. Rep., 446, 448.

Detroit, Ft. W. & B. I. R. Co. v. *Osborn,* 189 U. S., 383; 23 Sup. Ct. Rep., 540.

Chicago, B. & Q. R. R. Co. v. *Chicago,* 166 U. S., 226; 41 L. Ed., 979; 17 Sup. Ct. Rep., 581.

(a) When it is shown by the record that the state court considered and decided the federal question, the purpose of the statute is subserved. (Transcript of Rec., p. 25; of Rec., p. 46.)

Chicago, B. & Q. R. R. Co. v. *Chicago,* 166 U. S., ...; 41 L. Ed., 979; 17 Sup. Ct. Rep., 581.

Lehigh v. *Green,* 193 U. S., 79; 24 Sup. Ct. Rep., 390.

II.

"Due process of law" is that which secures to every one the right to have notice of any proceeding by which his rights to life, liberty or property may be affected, notice of written charges, and written charges preferred, and to be afforded an opportunity to defend, protect and enforce his rights in an orderly proceeding adapted to the nature of the case. (Transcript of Rec., p. 18; of Rec., p. 32.)

Holden v. *Hardy,* 169 U. S., 366; 18 Sup. Ct. Rep., 383.

Davidson v. *New Orleans,* 96 U. S., 97.

III.

"Due process of law" requires an orderly proceeding adapted to the nature of the case, in which the citizen has an opportunity to be heard and to defend, protect and enforce his rights, by establishing any fact which under the law would be a protection to him or his property."

10 American and English Encyclopedia of Law, 296, 300, and cases therein cited.

Holden v. *Hardy,* 169 U. S., 366; 18 Sup. Ct. Rep., 383.

IV.

"Due process of law" implies at least a conformity with natural and inherent principles of justice, and forbids that one man's rights to property shall be taken for the benefit of another, or for the benefit of the state, without compensation, and that no one shall be condemned in his person or property without an opportunity to be heard in his defense."

Holden v. *Hardy*, 169 U. S., 366; 18 Sup. Ct. Rep., 383.

VI.

The prohibitions of Section 1 of Article XIV of the Amendments to the Constitution of the United States are addressed to the state. They are these: No state agency shall make or enforce a law which will abridge the privileges or immunities of citizens of the United States.

Ex parte Virginia, 100 U. S., 339, 346.

Larson v. *City of St. Paul*, 86 N. W. Rep., 459.

Mayfield v. *Moore*, 53 Ill., 428, 430.

The People v. *Barrett*, 203 Ill., 99, 108.

Massie v. *Cessna*, 239 Ill., 352, 358.

Rasmussen v. *Carbon County Commissioners*, 45 Lawyers' Reports Annotated, 295, 300.

Civil Rights Cases, 109 U. S., 3, 11.

Yick Wo v. *Hopkins*, 118 U. S., 356, 366.

Taylor v. *Beckham*, 178 U. S., 600; 20 Sup. Ct. Rep., 1009.

(a) The inhibition contained in the Fourteenth Amendment means that no agency of the state, or of the officer or agents by whom her powers are exerted, shall deny to any person within her jurisdiction the equal protection of the law.

Ex parte Virginia, 100 U. S., 339.

Taylor v. *Beckham*, 178 U. S.; 20 Sup. Ct. Rep., 1009.

VII.

"Due process of law" requires that no citizen of a state or of the United States shall be deprived of his property without due notice of charges preferred, and of any proceeding by which his property may be affected, and a right to be heard and to defend, protect and enforce his rights, by establishing any fact which under the law would be a protection to him or his property.

Taylor v. *Beckham*, 178 U. S., 548; 20 Sup. Ct. Rep., 902.

Taylor v. *Beckham*, 178 U. S., 548; 20 Sup. Ct. Rep., 1009.

Gillespie v. *The People*, 188 Ill., 176, 182.

The People v. *Barrett*, 203 Ill., 99, 108.

Massie v. *Cessna*, 239 Ill., 352, 358.

Rasmussen v. *Carbon County Commissioners*, 45 Lawyers' Reports Annotated, 295, 300.

ARGUMENT.

I.

WE HAVE CONTENDED AND STILL CONTEND THAT PETITIONER, PLAINTIFF IN ERROR HEREIN, RAISED THE FEDERAL QUESTIONS IN THE STATE COURT IN SUCH A MANNER AS TO BRING THEM TO THE ATTENTION OF THAT TRIBUNAL, AND THEREFORE THE RIGHT TO REVIEW, IN THIS COURT, EXISTS.

We are supported in our contention by authorities as follows:

In the case of *Missouri, K. & T. R. Co.* v. *Elliott*, 184 U. S., 530; 22 Sup. Ct. Rep., 446, 448, at page 448, the court, speaking by Mr. Justice White, said:

> "The general rule undoubtedly is that those federal questions which are required to be set up and claimed must be so distinctly asserted below as to place it beyond question that the party bring the case here from the state court intended and did assert such a federal right in the state court. But it is equally true that even although the allegations of federal right made in the state court were so general and ambiguous in their character that they would not in and of themselves necessitate the conclusion that a right of a federal nature was brought to the state court *yet if the state court in deciding the case has actually considered and determined a federal question, although arising on ambiguous averments, then the federal question having been actually decided the right of this court to review obtains.* (*F. G. Oxley Stove Co.* v. *Butler County*, 166 U. S., 648, 660; 41 L. Ed., 1149, 1153; 17 Sup. Ct. Rep., 709.)
>
> "*All that is essential is that the federal ques-*

tions must be presented in the state court in such a manner as to bring them to the attention of that tribunal. (*Chicago, B. & Q. R. Co.* v. *Chicago,* 166 U. S., 226; 41 L. Ed., 979; 17 Sup. Ct. Rep., 581.) *And of course where it is shown by the record that the state court considered and decided the federal question, the purpose of the statute is subserved.* * * * The *result of the contrary doctrine would be this, that no case where the question of federal right had been actually decided could be reviewed here if the state court, in passing upon the question, had also decided that it was not federal in its character.*"

In the case of *Lehigh* v. *Green,* 193 U. S., 79; 24 Sup. Ct. Rep., 390-391, beginning at page 390, the court, speaking by Mr. Justice Day, said:

"A motion is made to dismiss because the claim of impairment of a right secured by the Fourteenth Amendment was not made in the courts of Nebraska until the motion for rehearing was filed in the Supreme Court. We are unable to discover a specific claim of this character made prior to the motion for rehearing. In the motion reference is made to the failure of the Nebraska Supreme Court to decide the claim theretofore made, that the statute of Nebraska was unconstitutional because of the alleged violation of the right to *due process* of law guaranteed by the Fourteenth Amendment to the Constitution of the United States. Be that as it may, *the Supreme Court* of Nebraska entertained the motion and decided the federal question raised against the contention of the plaintiff in error. In such case the question is reviewable here, although first presented in the motion for rehearing." (*Mallett* v. *North Carolina,* 181 U. S., 589; 45 L. Ed., 1015; 21 Sup. Ct. Rep., 730.)

II, III AND IV.

THE VALIDITY OF THE ACT OF JOSEPH KIPLEY, SUPERINTENDENT OF POLICE IN THE DEPARTMENT OF POLICE IN THE CITY OF CHICAGO, IN DROPPING THE NAME OF PETITIONER, PLAINTIFF IN ERROR HEREIN, FROM THE PAY-ROLL OF POLICE PATROLMEN IN SAID CITY, MARCH 14, 1898, WITHOUT NOTICE OF WRITTEN CHARGES PREFERRED AGAINST HIM, AND A RIGHT TO BE HEARD IN HIS DEFENSE, IS CHALLENGED UPON THE GROUND OF A VIOLATION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, IN THAT IT ABRIDGED THE PRIVILEGES AND IMMUNITIES OF A CITIZEN OF THE UNITED STATES, AS WELL AS OF THE STATE OF ILLINOIS, WITHOUT DUE PROCESS OF LAW AND DENIED TO HIM, SAID PETITIONER, THE EQUAL PROTECTION OF THE LAW.

In the case of *Holden* v. *Hardy*, 169 U. S., 366, 18 Sup. Ct. Rep., 383, 384, at page 384, the court speaking by Mr. Justice Brown, said:

> "The Fourteenth Amendment, *which was finally adopted* July 28, 1868, *largely expanded the powers of the federal courts and Congress and for the first time authorized the former to declare invalid all laws and decisions of the states abridging the rights of citizens, or denying them the benefit of Due Process of Law* * * *
>
> "In addition, the Fourteenth Amendment contains a sweeping provision forbidding the states from abridging the privileges and immunities of citizens of the United States, and denying them the benefit of Due Process, or equal protection of the laws. * * *
>
> "This court has never attempted to define with precision the words 'Due Process of Law,' nor is it necessary to do so in this case. It is *sufficient to say that there are certain immutable principles of justice, which inhere in*

the very idea of free government, which no member of the Union may disregard, as that no man shall be condemned in his person or property without due notice, and an opportunity to be heard in his defense."

(2) Due Process of Law:

Though all the preceding definitions throw much light on the meaning of due process of law, the most satisfactory definition is that it *secures to every one the right to have notice* of any proceeding by which his rights of life, liberty or property may be affected, and *to be afforded an opportunity to defend,* protect and enforce his rights in an orderly proceeding adapted to the nature of the case. (*Holden* v. *Hardy,* 169 U. S., 366; *Davidson* v. *New Orleans,* 96 U. S., 97.) * * *

(3) Due process of law requires an orderly proceeding adapted to the nature of the case, in which the *citizen has an opportunity to be heard and to defend,* protect and enforce his rights, by establishing any fact, which under the law would be a protection to him or his property.

10 American and English Encyclopedia of Law, 296, 300.

Holden v. *Hardy,* 169 U. S., 366, 391.

Holden v. *Hardy,* 18 U. S. National Reporter System, 383.

(4) Due process of law implies at least a conformity with natural and inherent principles of justice, and forbids that one man's right to property shall be taken for the benefit of another, or for the benefit of the state, without compensation, *and that no one shall be condemned in his person or property*

without an opportunity to be heard in his defense. (*Holden* v. *Hardy, supra.*)

V AND VI.

A DEPRIVATION, BY A MUNICIPALITY, OF THE RIGHT OF AN OFFICER OF THE LAW TO RECEIVE THE COMPENSATION PROVIDED BY LAW TO BE PAID TO SUCH OFFICER BY THE MUNICIPALITY, AND THE RIGHT TO RECEIVE SUCH COMPENSATION, AS OTHER OFFICERS OF THE SAME CLASS RECEIVE THEIR PAY, IS A DEPRIVATION OF THE PROPERTY RIGHTS OF SUCH OFFICER, AND IS IN VIOLATION OF SECTION 1 OF ARTICLE XIV OF THE CONSTITUTION OF THE UNITED STATES, AS WELL AS OF SECTION 2 OF ARTICLE 2 OF THE CONSTITUTION OF THE STATE OF ILLINOIS.

In the case of *Taylor* v. *Beckham*, 178 U. S., 548; 20 Sup. Ct. Rep., 902, beginning at page 902, the court, speaking by Mr. Justice Brewer, said:

> "An office to which a salary is attached, in a case in which the controversy is only as to which of two parties is entitled thereto, has been adjudged by this court, AND RIGHTFULLY, to be property within the scope of that clause of the 14th Amendment, which forbids a state to 'deprive any person of life, liberty, or property without due process of law.' In the case of *Kennard* v. *Louisiana ex rel. Morgan*, 92 U. S., 480; 23 L. Ed., 478, Kennard was appointed a Justice of the Supreme Court of Louisiana. Morgan claimed to be entitled thereto, and brought suit to settle title to the office. The Supreme Court of the state decided in favor of Morgan, and Kennard sued out a writ of error from this court on the ground that the judgment had deprived him of his office *without due process of law*, in violation of the foregoing provision of the 14th Amendment. Of course,

neither life nor liberty were involved, and the jurisdiction of this court could be sustained only on ground that the PROPERTY of Kennard was taken from him, as alleged, without due process of law. * * *

"As the question of the constitutionality of the statute was directly raised by the defendant, and decided against him by the court, we have jurisdiction, and the motion to dismiss must be overruled."

In the case of *Taylor* v. *Beckham*, 178 U. S., 548; 20 Sup. Ct. Rep., 1009, Mr. Justice Harlan, beginning at page 1009, of 17 Sup. Ct. Rep., said:

"The first case in this court relating to this subject is, *Kennard* v. *Louisiana ex rel. Morgan*, 92 U. S., 480; 25 L. Ed., 478. That was a writ of error brought by Kennard to review the final judgment of the Supreme Court of Louisiana declaring that he was not a member of that court. 'The case,' the report states, 'was then brought here upon the ground that the State of Louisiana acting under this law, through her judiciary, had deprived Kennard of his office without due process of law, in violation of that provision of the 14th Amendment of the Constitution of the United States which prohibits any state from depriving any person of life, liberty, or property without due process of law.' *Looking also into the printed arguments filed in that case, on behalf of the respective parties, I find that the attorney for the plaintiff in error, a lawyer of distinction, insisted that the sole question presented for determination by this court was whether the final judgment of the state court deprived Kennard of his office in violation of the above clause of the 14th Amendment. And this view was not controverted by the attorney for the defendant, also an able lawyer. The latter contended that the 14th Amendment had*

no application because in what was done no departure from the principles of due process of law had occurred. The opinion of Chief Justice Waite delivering the judgment of this court thus opens: "The *sole question presented for our consideration in this case*, as stated by counsel for plaintiff in error, *is whether the State of Louisiana, acting under the statute of January 18th, 1873, through her judiciary,* HAS DEPRIVED KENNARD OF HIS OFFICE WITHOUT DUE PROCESS OF LAW.' Of course this court had no jurisdiction to inquire whether there had been due process of law in the proceedings in the state court, *unless the office in dispute or the right to hold it was* PROPERTY *within the meaning of the 14th Amendment*, or unless Kennard's liberty was involved in his holding and discharging the duties of the office to which, as he insisted, he had been lawfully elected. *But this court took jurisdiction of the case and affirmed the judgment of the Supreme Court of Louisiana upon the ground that the requirement in the 14th Amendment of due process of law had not been violated.* IF, IN THE JUDGMENT OF THIS COURT, AS CONSTITUTED WHEN THE *Kennard* CASE WAS DECIDED, AN OFFICE HELD UNDER THE AUTHORITY OF A STATE WAS NOT "PROPERTY" WITHIN THE MEANING OF THE 14TH AMENDMENT, *the case would have been disposed of upon the ground that no Federal right had been or could have been violated*, and the court would not have entered upon the inquiry as to what, under the 14th Amendment, constituted due process of law in a case of which—according to the principles this day announced—it had no jurisdiction.

"In *Foster* v. *Kansas ex rel. Johnston*, 112 U. S., 201; 28 L. Ed., 626; 5 Sup. Ct., 8, 97,—which was a writ of error to review the final judgment of the Supreme Court of Kansas,—THE SOLE ISSUE WAS AS TO THE RIGHT OF FOSTER

TO HOLD THE OFFICE OF COUNTY ATTORNEY, the defendant in error moved to *dismiss the writ for want of jurisdiction in this court, and accompanied the motion with a motion to affirm.* This court refused to dismiss the case, and, referring to *Kennard* v. *Louisiana,* affirmed the judgment upon the ground that there had been, in its opinion, no departure from the process of law in the proceedings to remove Foster. *It never occurred to the court, nor to any attorney in the case, that the 14th Amendment did not embrace the case of a state office from which the incumbent was removed without due process of law.*

"If such an *office* was not deemed PROPERTY within the meaning of the amendment, *that was the end of the case here.* But the court took jurisdiction and disposed of the case upon the ground that the requirement in the Federal Constitution of due process of law had been observed. * * *

"*When the 14th Amendment forbade any state from depriving any person of life, liberty, or property without due process of law, I had supposed that the intention of the people of the United States was to prevent the deprivation of any legal right in violation of the fundamental guarantees inhering in due process of law. The prohibition of that Amendment, as we have often said, applied to all the instrumentalities of the state, to its legislature, executive, and judicial authorities; and therefore it has become a settled doctrine in the constitutional jurisprudence of this country that* 'WHOEVER BY VIRTUE OF PUBLIC POSITION UNDER A STATE GOVERNMENT DEPRIVES ANOTHER OF PROPERTY, LIFE, OR LIBERTY WITHOUT DUE PROCESS OF LAW, OR DENIES OR TAKES AWAY THE EQUAL PROTECTION OF THE LAW, *violates the constitutional inhibition; and as he acts in the name and for the state, and is clothed with the state's power,*

his act is that of the state. THIS MUST BE SO, OR (*as we have often said*) THE CONSTITUTIONAL PROHIBITION HAS NO MEANING. *The state has clothed one of its agents with power to* ANNUL OR EVADE IT.' (*Ex parte Virginia,* 100 U. S., 339; 25 L. Ed., 676; *Chicago, B. & Q. R. Co.* v. *Chicago,* 166 U. S., 226; 41 L. Ed., 979; 17 Sup. Ct. Rep., 581; *Scott* v. *McNeal,* 154 U. S., 34; 38 L. Ed., 869; 14 Sup. Ct. Rep., 1108.) Alluding to a contention that the party—a railroad company—which invoked the 14th Amendment for the protection of its property had the benefit of due process of law in the proceeding against it, *because it had due notice of those proceedings and was admitted to appear and make defense,* this court has also said: '*But a state may not, by any of its agencies, disregard the prohibitions of the 14th Amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the* FULLEST OPPORTUNITY TO BE HEARD, and yet it might be that its final action would be inconsistent with that amendment. In determining what is due process of law regard must be had to substance, and not to form.' (*Chicago, B. & Q. R. Co.* v. *Chicago,* 166 U. S., 226; L. Ed., 979; 17 Sup. Ct. Rep., 581.) Again, in another case: 'Though the law itself be fair on its face and impartial in appearance, *yet if it is applied and administered by public authority with an evil eye and an unequal hand it is still within the prohibition of the Constitution.*' (*Yick Wo* v. *Hopkins,* 118 U. S., 373; 30 L. Ed., 227; 6 Sup. Ct. Rep., 1064.) See, also: *Henderson* v. *New York,* 92 U. S., 259, sub. nom.; *Henderson* v. *Wickham,* 23 L. Ed., 543; *Chy Lung* v. *Freeman,* 92 U. S., 275; 23 L. Ed., 550; *Neal* v. *Delaware,* 103 U. S., 370; 26 L. Ed., 567; *Soon Hing* v. *Crowley,* 115 U. S., 703; 28 L. Ed., 1145; 5 Sup. Ct. Rep., 730.

"It is said that the courts cannot, in any case, go behind the final action of the Legislature to ascertain whether that which was done was consistent with the rights claimed under the Federal Constitution. If this be true then it is in the power of the state Legislature to override the supreme law of the land. As long ago as *Davidson* v. *New Orleans*, 96 U. S., 97, 102; 24 L. Ed., 616, 618, this court, speaking by Mr. Justice Miller, said: *'Can a state make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the states is of no avail, or has no application where the invasion of private rights is effected under the form of state legislation.'*

"More recently we have said: 'The idea that any Legislature, state or federal, can conclusively determine for the people and for the courts that what it enacts in the form of law, or what it authorizes its agents to do, is consistent with the fundamental law, is in opposition to the theory of our institutions. *The duty rests upon all courts, federal and state, when their jurisdiction is properly invoked, to see to it that no right secured by the supreme law of the land is impaired or destroyed by legislation.* The function and duty of the judiciary distinguishes the American system from all other systems of government. The perpetuity of our institutions and the liberty which is enjoyed under them depend, in no small degree, upon the power given the judiciary to declare null and void all legislation that is clearly repugnant to the supreme law of the land.' (*Smith* v. *Ames*, 169 U. S., 466; 42 L. Ed., 819; 18 Sup. Ct. Rep., 418.) *I had supposed that the principles announced in the cases above cited were firmly established in the jurisprudence of this court and that, if applied, they would serve to* PROTECT EVERY RIGHT that could be brought within judicial cognizance

against deprivation in violation of due process of law. * * *

"*I stand by the former rulings of this court in the cases above cited. I am of the opinion that, equally with tangible property that may be bought and sold in the market,* AN OFFICE—CERTAINLY ONE ESTABLISHED BY THE CONSTITUTION OF A STATE, *to which office a salary is attached, and which cannot be abolished at the will of the Legislature—is, in the highest sense,* PROPERTY *of which the incumbent cannot be deprived* ARBITRARILY *in* DISREGARD *of due process of law;* that is, as the court said in *Kennard* v. *Louisiana*, in regard to the rules and forms which have been established for the protection of private rights. APART FROM EVERY OTHER CONSIDERATION THE RIGHT TO RECEIVE AND ENJOY THE SALARY ATTACHED TO AN OFFICE IS A RIGHT OF PROPERTY. AND A RIGHT OF PROPERTY SHOULD BE DEEMED PROPERTY, *unless we mean to play with words, and regard form rather than substance.*

"I go farther, the liberty of which the 14th Amendment forbids a state from depriving any one without due process of law is something more than freedom from the enslavement of the body or from physical restraint. In my judgment the words 'Life, liberty, or property,' in the 14th Amendment, should be interpreted as embracing every right that may be brought within judicial cognizance, and therefore no right of that kind can be taken in violation of 'due process of law.' * * *

"What more directly involves the liberty of a citizen than to be able to enter upon the discharge of the duties of an office to which he has been lawfully elected by his fellow-citizens? What more certainly infringes upon his liberty than for the Legislature of the state, by merely arbitrary action, in violation of the rules and form required by due process of law, to take from him the right to discharge the public du-

ties imposed upon him by his fellow-citizens in accordance with law? Can it be said that the right to pursue a lawful calling is a part of one's liberty secured by the 14th Amendment against illegal deprivation; and yet the right to exercise an office to which one has been elected and into which he has been lawfully inducted is no part of the incumbent's liberty, and may be disregarded by the mere edict of a legislative body, sitting under a constitution which declares that absolute arbitrary power exists nowhere in a republic?"

In the case of *Massie* v. *Cessna*, 239 Ill., 352, 358, the court said:

> "The appellant insists that the statute in question violates Section 2 of Article 2 of the Constitution of the state, which provides that 'no person shall be deprived of life, liberty or property without due process of law.' This is the only question for consideration. * * *
>
> "The right to labor for and to render services to another, and the right to dispose of the compensation to be received for so doing are *property rights* within the meaning of the language just quoted from the constitution. (*Frorer* v. *People*, 141 Ill., 171; *Braceville Coal Co.* v. *People*, 147 Ill., 66; *Mallin* v. *Wenham*, 209 *id.*, 252.)"

VII.

WE CONTEND THAT THE SO-CALLED DISCHARGE OF PETITIONER, PLAINTIFF IN ERROR HEREIN, WAS AND IS IN VIOLATION OF SECTION 2 OF ARTICLE 2 OF THE CONSTITUTION OF THE STATE OF ILLINOIS, 1870, AND OF SECTION 1 OF ARTICLE XIV OF THE CONSTITUTION OF THE UNITED STATES, IN THAT SECTION 735 OF THE ORDINANCE OF 1881, TRANSCRIPT OF RECORD, P. 12, OF RECORD, P. 22, WHICH READS AS FOLLOWS: "SAID SUPERINTENDENT SHALL HAVE THE POWER TO REMOVE FROM THE POLICE FORCE ANY POLICE PATROLMAN AT HIS PLEASURE, AND, WITH THE CONCURRENCE OF THE MAYOR, HE MAY REDUCE IN RANK ANY OFFICER OR MEMBER OF SAID DEPARTMENT," CONFERRED ARBITRARY POWERS UPON THE SUPERINTENDENT OF POLICE OF THE CITY OF CHICAGO, SUCH AUTHORITY BEING BEYOND THE POWER OF THE LEGISLATURE OF THE STATE OF ILLINOIS, TO CONFER SUCH POWER UPON THE MUNICIPAL AUTHORITIES OF SAID CITY.

In the case of *Yick Wo.* v. *Hopkins,* 118 U. S., 356, 366, 373, beginning at page 366, the court, speaking by Mr. Justice Matthews, said:

> "There is nothing in the ordinances which points to such a regulation of the business of keeping and conducting laundries. They seem to confer, and actually do confer, not a discretion to be exercised upon a consideration of the circumstances of each case, but a *naked and arbitrary power* to give or withhold consent, not only as to place but as to person. * * * The facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that whatever may have been the intent of the ordinances as adopted, they were applied by the public authorities charged with their administration, *and thus representing the*

state itself with a mind so unequal and oppressive as to *amount to a practical denial* by the state of that equal protection of the law which is secured to the petitioners, as to all other persons."

In conclusion we ask that this case may be reversed and remanded that a hearing, in accordance with the law of the land may be had.

A. B. CHILCOAT,
Attorney for Plaintiff in Error